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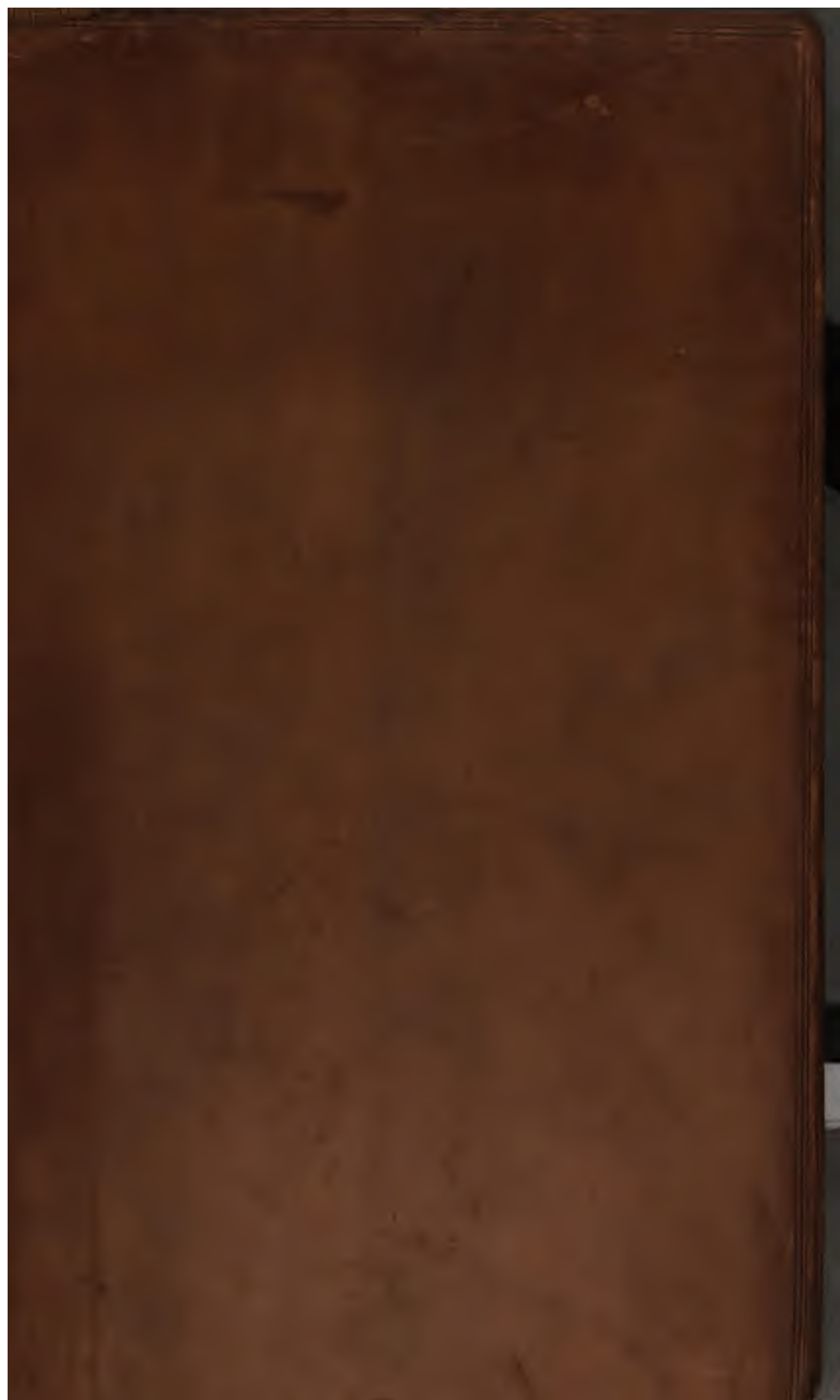
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L. Eng. & Soc. H.

CW.U.K.

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J. T. Colledge
R E P O R T S
Montague Place
OF
CASES

ARGUED AND DETERMINED IN
THE COURT OF EXCHEQUER;

FROM
MICHAELMAS TERM, 36 GEORGE III.

TO
TRINITY TERM, 37 GEORGE III.

BOTH INCLUSIVE.

BY ALEXANDER ANSTRUTHER, Esq.

Of Lincoln's Inn, Barrister at Law.

—◆—
Second Edition.

VOL. III.

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1817.



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CASES
ARGUED AND DETERMINED
 IN THE
COURT OF EXCHEQUER,
 IN
MICHAELMAS TERM,
36 GEORGE III.

Mr. Baron HOTHAM was unable to attend the Court in the beginning of this Term.

CADWALLADER v. BATLEY.

Tuesday,
 10th November,
 1795.

THIS was an action for work and labour; the sum claimed 4*l.* 10*s.*: the defendant paid 1*l.* 11*s.* into court, which the plaintiff accepted; *Dauncey* thereupon obtained a rule to shew cause why the plaintiff should not pay the costs, relying on this as an admission that the sum due was under 40*s.*

The defendant paid 1*l.* 11*s.* into court, which the plaintiff accepted; he is not therefore liable to costs, as suing for a sum under 40*s.*

Cause was shewn by *Espinasse*.—The defendant offered to pay us 1*l.* 11*s.* with costs,—he cannot bring the money into court without that condition. We have agreed to accept his offer; it is

therefore mutually binding. An agreement to take less than the full demand does not admit the smaller sum to have been alone due. Besides, it does not appear that the parties were amenable to any inferior jurisdiction, and the mere circumstance of the sum being under 40s. does not alone make the plaintiff liable in costs.

He also produced affidavits of the sum due being above 40s. and that the money paid in was accepted upon collateral considerations.

Dauncey produced affidavits of the sum due being only 1*l.* 11*s.* that no demand had ever been made, and that the defendant had always been ready to pay it; he relied on *Johnson v. Houlditch*, 1 Burr. 578. The condition of paying costs is a necessary part of the offer to bring money into court. But it now appears, by the offer being accepted, that this action ought never to have been commenced.

MACDONALD, Chief Baron.—The plaintiff may be inclined, from many circumstances, to accept less than his demand. It is therefore no admission of the sum accepted being the whole due.

The rule was discharged.

Wednesday,
11th November.

OSELAND *v.* OSELAND and Others.

PHILIP MORRES being possessed of considerable real and some personal estate, by his will gave “to his three daughters each 500*l.* to be paid to

“ them severally within five years after his decease,
 “ if they were then alive, or any issue lawfully be-
 “ gotten of their several bodies, to be paid by his son
 “ *Thomas Morres*, the interest of the three sums of
 “ 500*l.* to be paid from his decease at 4 *per cent. per*
 “ *annum*, for as many years as hisson should chuse
 “ to keep it in his hands of the five years to be ex-
 “ pired; but if there should be no issue living from
 “ any of the three daughters at the end of five years
 “ after his decease, then his will was, 20*l.* should
 “ be paid to that daughter or daughters, having no
 “ living issue, during her natural life or lives, and
 “ the several and respective sums of 500*l.* each, to
 “ be paid to them so dying without issue, should
 “ be equally divided between the survivors or their
 “ issue, share and share alike, the issue or issues of
 “ the deceased parent to receive their parent’s share
 “ or shares;” subject to this charge, he gave all
 his real and personal property to his son.

Oseland, the defendant, was the husband of one of
 the daughters, who died within five years after the
 death of the testator, leaving the plaintiff, her only
 child, her surviving. The son conveyed certain
 estates in discharge of the legacies within five years
 from the death of the testator. The defendant *Oseland*
 conveyed his interest in the lands so conveyed to
 the defendant *Duppa*, as having vested in his
 wife under the will, immediately on the decease
 of the testator. The plaintiff claimed the said
 sum of 500*l.* as not having vested in his mother,
 but in him, by her dying before the expiration of
 the five years.

Burton and Alexander for the plaintiff. The whole of this will is to be taken together, for the separate parts will otherwise be contradictory. By the first clause the legacy is payable *within* five years, in case of the daughters or their issue being then alive;—the word *then* shews that the words *within five years*, mean, at the end of that period; and the next clause making the son pay 4 *per cent.* for so much of the five years as he should keep the money unpaid, merely relates to his liability from retaining the money; it does not mean to describe the time of payment, except by allowing him to discharge himself immediately. If the daughter has no issue at the end of five years, the share lapses, and she becomes entitled to a different benefit, an annuity of 20*l.* a year;—this excludes the idea of the legacy having vested in her.—The survivorship to the other daughters is only in case of one dying without issue within the five years. Then the last clause explains that this sum, which was not before vested in any person, does at the end of the five years vest in the issue of the deceased.

Pemberton for the defendant *Duppa*.—The legacy is to the daughters only, subject to the condition of their having children living at the time limited. It is clear that the son has an option of paying the legacy at any time within the five years, if the daughter shall *then* have issue; that is, at the time of such payment. And he did in fact pay it, by conveying the lease while the daughter was alive and had issue. He is to pay interest for the legacy for so many of the five years as it shall be unpaid; then he might pay the legacy at the beginning of the pe-

tied, and there must be somebody then capable of receiving it; it must be at that time a vested interest. This interest in the daughter is made subject to the chance of being divested, in the event of her being alive without issue at the end of five years. If she dies without issue in that period, it is provided, that the share shall survive to the other daughters, and the benefit of survivorship is extended to the issue of a deceased daughter. This clause does not relate to any interest in the original share, which is given only to the mother.

MACDONALD, Chief Baron.--The will is inartificially drawn, but the intent of the testator seems very clear: if the five years was meant as a floating period, at any part of which the son had it in his option by payment to render the legacy a vested interest, the testator would hardly afterwards use the words *then alive*; that reduces it to a definite period, the expiration of the five years. He goes on to give interest for so many of the five years *to be expired*, as the son should keep it in his hands; the expiration of the five years is therefore clearly marked as the date of the legacy being due. It is intended merely as a benefit to the son that he is allowed to liberate himself from payment of interest by paying the money sooner. The will adverts to a want of issue at the end of five years, and gives an annuity only in that case; then that is the period of the legacy vesting either in the mother, or in the issue in the case of her death. The general meaning of the testator seems to be this: If the daughter is alive, and has issue at the end of five years, the legacy vests in her; if her issue only are then alive, in them. If she is then living, but without issue, she has only the an-

nuity. If she is then dead, without issue, it survives to the other sisters. The period of five years pervades the whole, as limiting the period when it is to be determined which of the bequests is to take effect.

PERRYN, Baron.—The will is very obscurely expressed, but when the whole is taken together, the meaning seems to be, that in case of any of the daughters being dead at the end of five years, but leaving issue who live to that time, the legacy vests in them. It is expressly said, that the issue shall take the share of the deceased parent, and this cannot be otherwise understood.

THOMSON, Baron.—The expressions of the will are obscure, but the construction put upon them by my Lord and my brother *Perryn*, seems to me to be the true one. The liberty to the son to pay the money before the end of five years, does not necessarily imply that the legacy is vested before that time; he might file a bill here in order to exonerate himself from payment of interest, and pay the money into Court to abide the event.

*Wednesday,
13th November.*

WORRAL v. MILLER.

THIS was a suit for tithes of the produce of a hot-house and other things. The defendant resisted the demand for tithes for the hot-house, but admitted the others to be due.

Benyon, for the defendant, moved for leave to pay into Court the value of the other tithes, with the costs of that part of the suit, and the plaintiff to proceed at his peril; comparing the case to payment of money into Court on one count of a declaration.

Richards, contra.

The Court refused to allow the motion unless on payment of the whole costs then incurred.

WEDLAKE v. HUTTON.

Wednesday,
18th November.

BILL of foreclosure stating the plaintiff to be entitled to the equity of redemption of a messuage and forty acres of land held by the defendant as mortgagee.

The defendant pleaded an absolute title in himself, deducing his claim under the same conveyances set up by the bill. The plea stated the premises to consist of a messuage and tenement, (as it was denominated in the conveyances,) and averred, that they were the same which were meant by the bill.

Shuter objected that there was no plea as to the forty acres; and that the plea being to the whole bill was bad.

Plumer and *Short* for the plea insisted, that the word "tenement" might relate to any land; and the

avowment of identity is a fact traversable, and which the defendant is bound to prove.

The *Court* thought this plea could not be considered as relating to the forty acres of land; and over-ruled the plea.

Same day.

ANDREWS v. BERRY.

A bill lies to have discovery of the consideration of a security alleged to be given by money lost at play, and to have it delivered up.

THE bill stated, that the defendant had obtained a promissory note from the plaintiff for money won at play, and had commenced an action at law upon it. The bill prayed a discovery, and that the note might be declared null, and that the defendant might be decreed to deliver up the same, and might be restrained by injunction from negotiating it.

The defendant demurred to the discovery and relief.

Johnson in support of the demurrer argued, that this suit was not warranted by the statutes 9 *An. c. 14.*, 18 *G. 2. c. 34.*, or any other upon this subject. Those statutes take two methods to prevent gaming; the one by declaring all securities for money won at play null and void; the other by giving an action to recover money lost at play and paid. In the latter case it is enacted, by both these acts, that equity may enforce a discovery upon the subject, and

proceed to pronounce a decree concerning it. This is contrary to the general rules of courts of equity, for it goes to assist a forfeiture in violation of the contract of the parties. It is therefore to be taken strictly. The jurisdiction of equity is confined by the statutes to the case of money lost at play and paid, and the interference of equity being expressly given in that case, negatives its extending to the other provisions of the statute.

Burton and Lewis contra. Even before these statutes, one could not recover on securities given for gaming debts; 14 *Vin. Abr.* tit. *Gaming* (A). 1 *Salk.* 344. *Carth.* 356. 5 *Mod.* 175.; and equity interfered to avoid such securities. 14 *Vin.* tit. *Gaming* (D). *Cromer v. Champney*, *Toth.* 81. *Hubbard v. Lord Crompton*, *Toth.* 81. *Sucklyn v. Morley*, *Toth.* 84. *Delabarr v. Cox*, *Toth.* 86.

Courts of equity have considered the law which awards securities for gaming transactions, as a regulation of public policy which ought to be encouraged. *Fleetwood v. Jansen*, 2 *Atk.* 467.

But, upon the general principles of equity, this security being void, we are entitled to a discovery of that fact, and to have the void security delivered up.

Plumer, amicus curiæ, mentioned the case of *Newman v. Franco*, (*ante*, vol. 2. p. 519.) as exactly in point.

The Court on the authority of that case,

Over-ruled the demurrer.

Wednesday,
18th November.

NICHOLS v. PHILIPS and Others.

THE plaintiff at law distrained; on replevin he made three cognizances for rent of the premises; one as bailiff of *Philips*, the two others as bailiff of other persons. This bill stated that the plaintiff held the premises as tenant to *Philips*, who had received goods from him under stipulation that the plaintiff might retain the amount out of the rent. It also stated that *Philips* had since absconded in insolvent circumstances, and prayed that the plaintiff might have liberty to retain the value of the goods out of the rent, and an injunction till answer.

Johnson moved for an injunction.

The *Court* thought that the other cognizances could not be hung up till *Philips* should answer, and therefore refused the injunction.

Tuesday,
24th November.

STONE v. STEVENS.

RUSSEL moved to justify bail.

Dauncey objected that there were added bail, and that the notice of their being added and of their

justifying was given together. He relied on the case in last Term, (*vide ante*, vol. 2. p. 564.) The practice was, however, declared by the officers to be otherwise, and it appeared that that case was afterwards found to be contrary to the practice of the Court, and the advantage was accordingly waived.

ROUTH *v.* PEACH.

Wednesday,
25th November.

THIS plea came on to be re-heard. In addition Vi. ante, vol. 2. p. 519. to the former statement it appeared, that by the award, the arbitrators directed that the partnership should, as between the partners, be considered as having ended at a day then past, and that the plaintiff should be at the risk of all debts incurred subsequent to that day. The bill stated that the debts discharged by the plaintiff, and for a contribution to which this bill was filed, were incurred by the partnership.

The *Court* thought that this might apply to debts incurred after the day fixed by the award, after which the plaintiff was to stand to the risk of the debts; from that day, as between the parties, the partnership was considered as dissolved, but as between them and their creditors it still subsisted. The arbitrators proceeded on a supposition that the partnership effects were sufficient to pay all demands up to that time,

and the Court will presume that that supposition was well founded until it is expressly negated.

The order was affirmed.

Plumer and *Short* in support of the plea; *Partridge* against it.

Same day.

ORD V. CLARKE.

• A modus payable by the owners of the land covered by it, is good.

IN this cause the defendant set up a modus to cover part of the lands of which tithes were sought by the bill. The modus was payable by the owners of the land.

Burton objected that this was unreasonable, as the parson was thereby obliged to seek about for the person to pay him his modus, instead of claiming immediately from the tenant either the modus or tithes in kind. Perhaps, where the tithes arise subsequent to the time of the modus being due in each year, this remedy may be open to him under the present modus; but for those tithes which annually arise before the time fixed for paying the modus, the parson has no compensation, unless he can find the landlord, there being no remedy against the tenant.

Partridge and *Johnson* insisted that this might well be a fair and reasonable agreement at the time of its commencement, before memory, when the

ownership of land was not subject to so much uncertainty and fluctuation as at present; probably the parson then thought it more advantageous to have the landlord as his security than a poor tenant.

MACDONALD, Chief Baron.—Undoubtedly the parties might make this agreement on what terms they thought proper, and there seems nothing to render it impossible that the composition may have been entered into in the terms stated by the answer. The common practice is to make the occupier answerable: but, perhaps, the parties may have thought the other mode more beneficial in point of security; and we ought not nicely to weigh the validity of that judgment.

The other Barons concurred, and Mr. B. Thomson mentioned the case of *Chapman and Monson*, 2 P. Wms. 573. as an authority that the Court ought not narrowly to investigate the reasonableness of a modus, which presumes a composition with consent of the parson, patron, and ordinary, before time of memory, although, perhaps, it may not now appear a wise provision for the interests of the parties in every respect.

The modus was claimed in respect of divers pieces of land consisting of about 61 acres, parcel of an ancient estate called R. estate, consisting of 1500 acres, covered by the modus.

Burton objected that the land should have been set out by metes and bounds.

The Court thought the description sufficiently certain.

TENNANT v. STUBBING.

Stubble mown
and used as
fodder or ma-
nure is not
titheable.

THIS was a suit by the plaintiff as vicar of *Higham* in *Suffolk*, and lessee of the rectory, for an account of several species of tithes. One point in the cause was, whether tithes were payable of stubble mowed and used as fodder.

Burton and *Bell* insisted that tithes were due for the stubble, as they would have been for the straw, where the stubble is used in the same manner as straw. They relied on *Burn's Ecclesiastical Law*, tit. *Tithes*, c. 5. s. 5.

Partridge and *Pemberton* contended that tithes are only due for the first cutting of the straw, and that like the aftermowth of hay the stubble is not titheable. They insisted that the authorities 1 *Roll. Abr.* 641. 2 *Inst.* 652. had never been over-ruled, and that the note in *Burn* was a mistake.

MACDONALD, Chief Baron.—It appears that the stubble in question was partly used for fodder, and partly for manure; so that the whole of it was consumed in the husbandry; and it is not the case of a farmer leaving an unusual quantity of stubble to make a fraudulent profit of it. It is decided in the authorities cited from Lord *Coke's Institutes*, and from *Rolle's Abridgment*, that no tithes are due for such stubble.

A doubt is suggested in *Burn*, on the general principle that tithes are due of every increase of

the land, and the modern practice of the courts of equity is said to be contrary to the old authorities : but this seems to be a mistake ; no case to that effect is mentioned in the books, nor exists in the memory of any person. The old authorities decided the point, which seems to have been at rest ever since.

Another question arose concerning the mode of tithing wheat in the parish. The answer insisted on a custom of tithing by making up the wheat, when cut, into equal sheaves, permitting the rector (to whom notice of carrying away the wheat was first to be given) to take every tenth sheaf, and in case of his neglecting to attend for that purpose, setting out for him every tenth sheaf as it was taken to the cart employed in the removal of the wheat.

A custom of tithing, by throwing aside every tenth sheaf, as the corn is about to be carried, is bad. Tithes must be set out so that the rector may compare them with the other parts.

The custom of the parish appeared to be to make up the sheaves into shocks or threaves, in the size of which uniformity was not regarded ; and that the tithes were never set out till each tenth sheaf came to the fork and was thrown aside for the rector, he having no other election or opportunity of judging of the fairness of his tithes, except by rejecting the tenth sheaf when about to be thrown aside for him, and taking the eleventh.

Where by the custom notice of tithing is to be given, an hour's notice is not sufficient.

The same practice was observed in this particular case. The wheat had been unequally shocked, and only one hour's notice of carrying it away was given ; the rector did not attend ; every tenth

sheaf was thrown aside for him, and the sheaves were sworn to have been equal; he refused to accept the tithes so set out, and they were left to rot upon the field.

It was insisted for the rector that the customary mode of tithing, as proved, was illegal. It is essential in the mode of setting out tithes, that the rector shall have an opportunity of seeing the tithes separated from the other nine parts, so as to compare the one with the other. *Watson 551.* Whether they are set out in shocks or in sheaves, if the tithes are regularly set apart, he has this opportunity; he can see whether he has his proper proportion of shocks or sheaves, and whether those set out for tithes are of equal dimensions with the others. Where the tithes are taken in sheaves, and all the ten parts are put by the farmer into unequal shocks, the rector can neither compare the size of his sheaves with the others, nor can he calculate the number to which he will be entitled. He may, indeed, if he attends, observe the size of each sheaf, and take the eleventh instead of the tenth; but if, by the order of putting the sheaves into the cart, the tenth is generally a small one, and therefore rejected, the rector will only have one eleventh part of the corn instead of his tenth: besides, this abridges his opportunity of comparing them to the moment of carrying away the corn, whereas he is by common law entitled to the whole space of time between the cutting and carrying it away.

But if the custom were good, it has not been complied with. Notice must be given to the rector; that implies reasonable notice; but in the middle of harvest while the rector is engaged in tithing the other fields

and farms in the parish, and liable to be employed in the discharge of his religious duties, it is impossible that one hour can be sufficient notice.

For the defendant it was argued, that the custom set up was good, and had been complied with. It is proved that the sheaves were equal, and that every tenth was thrown aside for the rector; then actual fraud is negatived. In tithing by sheaves, the farmer is not in general bound to shock the tithes, nor to give any notice to the rector; by the custom he does both; then supposing it to be true that the rector has not the usual opportunity of comparing the ten parts, the advantages and disadvantages given by the custom are reciprocal and legal.

But in fact the rector can as well compare the sheaves when each is thrown into the cart, as if they were dispersed through the field; and the choice of taking the eleventh in place of the tenth gives him a superior advantage.

The notice must be reasonable according to the nature of the subject-matter. The farmer resolves to carry away the corn when he perceives it to be in a proper state, or sometimes very suddenly, upon the appearance of approaching bad weather. In such a case an hour's notice may be as much as can be given, and the rules of tithing cannot compel the farmer to lose the best opportunity of housing his crop, and so endanger its safety.

MACDONALD, Chief Baron.--The custom of tithing wheat, as laid in the answer, seems not materially

CASES IN THE EXCHEQUER,

to differ from the common law mode of tithing by sheaves, and is clearly good where that practice has obtained. But the evidence has introduced another part of the custom, essentially differing from the common law mode of tithing, and highly prejudicial to the tithe owner. By the custom the farmer is to put the sheaves into shocks of uncertain, and, in the present case, of unequal magnitude. This custom seems to us to be unreasonable, and therefore void, for it deprives the tithe owner of an advantage which the law always gives him, of having his tithes so set out that he may compare them with the other parts. The custom proved differs also essentially from that laid, and therefore does not support the allegation in the answer.

The notice given is also insufficient. The notice should be such as will give the rector time to attend the setting out of the tithes. But when we consider that the rector has other functions which demand his attention, and which may, for a considerable time, require his presence at the further extremity of the parish, it is impossible to say that an hour is sufficient notice for him to see that he is not defrauded of his dues.

The defendant has not therefore brought himself within the custom as laid. There must be an account directed against him for this species of tithe.

LONGMAN and BRODERIP and Others (their Assignees) *v.* CALLIFORD. *Same day.*

LONGMAN and Broderip, the bankrupts, entered into an agreement with Calliford for fourteen years to be supplied by him with musical instruments, at a stipulated rate, to be sold in the name of Longman and Broderip, and at their risk; and Calliford stipulated not to sell any on his own account. After the bankruptcy, Calliford sold the instruments for himself, conceiving the agreement to be determined by the bankruptcy. The assignees had permitted Longman and Broderip to carry on the business for the benefit of the estate, and gave notice to Calliford of their intention to continue the contract, at the same time offering him security for the instruments to be furnished.

The bill, and affidavits in support of it, stated these facts, and that Longman and Broderip had at a great expence established the character of the musical instruments sold by them, so as materially to increase their value. The present was a motion before answer, (in the nature of an order to stay waste,) to restrain the defendant from selling these instruments to any persons but the plaintiffs, as being contrary to the agreement.

Plumer and Hart argued in support of the motion; Burton against it.

MACDONALD, Chief Baron.—The present motion is an attempt to anticipate, by an interlocutory order, our decision upon the effect of the contract between the parties, and to obtain in that shape specific performance of it. The Court never interfere in this stage of the cause, unless in those cases where the defendant is committing a trespass, by which immediate injury may be sustained; as in the motion to stay waste. In matters of contract it is never done.

The motion was refused.

Same day.

BIDDIFORD v. PARTRIDGE.

THIS was a bill to perpetuate testimony of a modus. After the commission executed, but before publication, the plaintiff served the patron and ordinary with process, which he had before omitted to do. *Stratford* now moved for a new commission. He admitted that in a suit for relief this would not be a proper motion, because the evidence of a witness, in such a suit against the rector to prove a custom, would, after his death, be evidence of reputation against all others; but took the distinction, that in a bill to perpetuate testimony, the depositions could never be read but against the parties to the suit.

The Court at first doubted of the propriety of the application, and started this difficulty, that the new

parties, by cross examination, may obtain testimony contradicting the former. Perhaps the whole may be done with a view to carry the depositions further; and if the second commission only is opened, that may succeed. On the other hand, to open both seems contrary to the spirit of this motion, which supposes the second alone to be legal evidence against these parties.

Upon its being mentioned again, the Court granted the order.

SMALLBROOKE v. Lord DONNEGAL.

Same day.

THE plaintiff obtained an order *nisi* for sequestration, for not answering.—The answer was put in before the order was made absolute.

Simpson moved for costs of the contempt.

Hollist.—A privileged person is not in contempt unless he neglect to obey the order *nisi*.—Therefore no costs are due.

He also objected, that the order *nisi* was irregular, in not having been served personally on the defendant.

On reference to the officers, the Court found that service of the order *nisi*, on the clerk in court, was sufficient; the absolute order alone requires personal

service.—Upon the other point the Court held that the defendant was not in contempt; and the plaintiff took nothing by his motion.

Same day.

WELLS v. CORBYN.

SCAFE moved for an order on the officers of the Ecclesiastical Court to deliver out to his client, for the purpose of being produced here, a will proved in that court, on receiving security for its being returned. The only ground of the motion was the saving the expence of copying the will, which was very long. He relied on the cases of *Williams v. Floyer*, *Amb.* 343. and the cases there cited; *Frederick v. Aynscombe (a)*, *Ibid.* and 1 *Atk.* 627. *Lake v. Causfield*, 3 *Bro. R.* 263.

By the *Court*.—Probably there were some particular circumstances in those cases which made the production of the original will necessary. The rights of other persons may be involved, and we cannot as of course take the will out of that custody in which they are interested and entitled to have it preserved.

(a) It appears by the report of this case in *Atk.* that the application was on behalf of a devisee of real estate, in proving whose title the probate of the will from the Ecclesiastical Court is no evidence, and against whom perhaps the Ecclesiastical Court has no exclusive title to the possession of the will. The case cited in *Ambler* from 2 *Str.* 961, and probably all the other cases were of the same description.

SITTINGS AFTER MICHAELMAS TERM,
SERJEANTS INN HALL.

LISLE v. LIDDLE.

Monday,
14th December.

THE plaintiff was the insurer of a ship of the defendant, which was lost, and thereupon the plaintiff gave him promissory notes for the amount insured; having afterwards reason to suspect fraud, he refused to pay the notes. An action at law was brought, and the plaintiff filed this bill for discovery and injunction, and to have the notes delivered up. Upon the answer coming in the injunction was dissolved, the parties went to trial, and the plaintiff (defendant at law) had a verdict. The plaintiff afterwards went on with the cause here, putting the judgment at law on the record by a supplemental bill, and the cause now came on to a hearing.

Romilly insisted that it was now decided by the judgment at law that the money was not legally due, and therefore the notes being given by mistake, the defendant should have delivered them up to the plaintiff, according to the prayer of the original bill. That the plaintiff was now entitled to that relief, with the costs of the suit; and the

being no longer in danger at law, does not destroy his relief in equity to have the bills delivered up. *3 Bro. R.* 16, 17.

King insisted that the plaintiff should shew some equity arising since the verdict. The benefit of the suit here was obtained by the verdict; the defendant has never refused since then to deliver up the notes, nor is it pretended that he either has negotiated or means to negotiate them: to proceed in the suit is merely vexatious.

MACDONALD, Chief Baron.—The whole is occasioned by your misrepresentation, and you have therefore no right to complain. You ought to have obeyed the prayer of relief by delivering up the notes. The plaintiff is regular in proceeding to enforce his equity.

THOMSON, Baron.—Suppose the case had gone on to a decree on the original bill, and the Court had directed an issue, and it had been found for the plaintiff here; he must have had his relief upon the equity reserved.—That is in effect the case here. The succeeding at law does not destroy the equity of the plaintiff.

The *Court* decreed for the plaintiff, with costs.

PATTON v. PANTON.

Friday,
18th December.

THE plaintiff obtained an injunction, for want of an answer. The defendant put in his answer on 20th *April* last. The plaintiff obtained an order to amend on the 21st *June*, but gave no notice of it to the defendant, nor amended the bill till this Term.

Hollist obtained an order, as of course, (after the bill was amended,) to dissolve the injunction.

Burton moved to discharge that order, for irregularity.

On reference to the Master, the order was found to be regular, and the plaintiff took nothing by his motion.

BLAKE v. JONES.

A Testator left *A.* and *B.* joint executors and residuary legatees. *A.* assigned all his share in the residue to the plaintiff, giving him a letter of attorney to receive it, and died. The plaintiff sued to have the half of the residue (which consisted of stock in the funds) transferred into his name.

Plumer and *Hart*, for the surviving executor, objected that the personal representative of *A.* should have been made a party.

Pigott and *Woodeson* contra.—It is like the common case of the assignor of a bond, or of a mortgage. The receipt for the consideration, which is contained in the assignment, is evidence of our title, unless it is disputed on a ground of fraud. It is not stated that there is any personal representative.

The *Court* held, that it was good enough without making the assignor or his representative a party, unless where the validity of the assignment is denied, or there appears to the Court any doubt upon that head.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

HILARY TERM,

36 GEORGE III.

GORE *v.* WILLIAMS.

THE writ of *quo minus* was returnable on the Morrow of *All Souls*, 3d November. The plaintiff on the 9th served the sheriff with a rule to return the writ; it was returned, according to the exigency of the rule, on the 13th. Afterwards, on the same day, a rule to bring in the body was served on the sheriff. On the 16th, notices of bail and their justification were given for the 18th; and on that day the bail came up to justify, but the Court being of opinion that the time for bringing in the body was expired, refused to let the bail justify, and granted attachments against the sheriff.

The rule to bring in the body may be taken out on the day immediately after the sheriff has returned the writ, if the time for putting in bail is then expired.

—
Bail excepted to, and not justifying are still competent to surrender the principal.

Dauncey moved to set aside these proceedings as irregular: he relied on *Hutchins v. Hird*, 5 Term Rep. 479. to shew that although the sheriff had in fact returned the writ before the shutting of the office on the 13th, so that the plaintiff had time afterwards to take out the rule to bring in the body on that day, yet the rule could not legally issue till the next day.

He insisted, that the bail appearing to justify before a trial had been lost, the plaintiff was not entitled to the benefit of the attachment against the sheriff. *Callan v. Tye*, 2 H. Black. 235. *Hill v. Bolt*, 4 Term R. 352. The trial was lost by the bail not being allowed to justify on the 18th.

Rouse shewed cause. To the last objection he answered, that the attachment against the sheriff was regular, and could only be set aside on motion, on the terms of paying costs and perfecting bail. While it remains, bail cannot be put in.

He contended that the plaintiff was regular in taking out the rule on the 13th. Where the time for putting in bail is not expired till the end of that day on which the writ is returned, as in *Hutchins v. Hird*, the rule to bring in the body cannot issue till next day. Here the time for putting in bail was expired, and therefore the rule might issue immediately after the actual return of the writ. *Spicer v. Linnel*, C. B. E. 23 Geo. 3. *Imp. Pract. K. B.* 159. *Parker v. Wall*, K. B. M. 26 Geo. 3. *Tidd Pract.* 162.

He also objected, that the defendant was not in court, so as to make the present motion; the first

bail who were offered, being excepted to, did not justify. The added bail were rejected as not being in time. Afterwards the first bail surrendered the principal. They were no longer capable of doing so: bail excepted to and not justifying are not bail.

Dauncey.—They are still liable on the bail-piece, unless their names had been struck off. They may therefore surrender the principal in their own discharge.

The *Court* held, that the bail though excepted to were still competent to surrender the principal while their names continued on the bail-piece.(a)

On the other point, the Court referred the matter to the Master, to look into the practice. He this day reported the plaintiff regular.

The rule was discharged.

(a) *Jacques v. Holland*, *Exch. T. 31 Geo. 3*.—This came on by summons before Lord Chief Baron *Eyre*; the bail were excepted to, and a rule to bring in the body given; the bail surrendered without justifying. The Lord Chief Baron determined the surrender to be regular.

S. P. *The King v. The Sheriff of Essex*, 5 T. R. 633.

Wednesday,
4th February.

MERRIT v. MEEK.

AN order *nisi*, for costs, for not proceeding to trial, was served on the plaintiff's clerk in court; no cause being shewn it was made absolute: the defendant obtained the Master's allocatur for his costs, served the plaintiff with the order and allocatur, and demanded his costs, and now moved for an attachment for non-payment. The Court at first refused the rule as irregular, considering that there ought to have been personal service of the rule *nisi*, so as to bring the plaintiff into contempt. But it being moved again, and the practice appearing to be regular, the Court granted the attachment.

Saturday,
7th February.

BOYER v. BLACKWELL.

Increase of
price offered is
not alone a rea-
son to open bid-
dings after the
report con-
firmed.

PLUMER moved to open the biddings at a sale before the Deputy Remembrancer; the report was confirmed 14th *November* last. The rise of price offered was 800*l.* the sale having been for 7,300*l.* He relied on *Gower v. Gower*, and the other cases cited in *Watson v. Birch*, 4 Bro. R. 172.

Burton, on behalf of Mr. *Cumberland*, the purchaser, relied on the case of *Watson v. Birch*, as establish-

ing the rule that a mere increase of price is not sufficient to open biddings. There other circumstances were relied on, particularly that of the defendant being in prison and incapable of attending to his own concerns. Here there is no suspicion of collusion or of ignorance; the price at the sale was by no means an undervalue; and the person who now offers a rise of price, is the tenant of the land, who must have known its value.

The Court at first entertaining considerable doubts, it was suggested on behalf of the purchaser, that he had bought other contiguous lots, in confidence of having this portion of the estate, and that he ought to have the option of opening the biddings in these also, if the first were taken from him.

The Court inclined to think this reasonable, but the purchaser chose to keep the other lots.

The Court were of opinion that the mere circumstance of an advance of price was not sufficient to open the biddings, unless there were circumstances raising suspicion in the transaction; and

Where one person is reported purchaser of several lots before the Master, if the biddings are opened as to one he shall have an option to open them as to all. *Semb.*

MACDONALD, Ch. Baron, observed, that this doctrine was very fully gone into by the Lord Commissioner *Ashhurst*, in *Watson v. Birch*. If one who has given a fair price, and is confirmed purchaser before the Master, is liable at the distance of several months, and after he has arranged his affairs upon the faith of the purchase, to have it set aside, upon the mere circumstance of another person offering a larger price, it must materially affect all sales under the authority of the Court, by deterring pur-

chasers from bidding. It is therefore the general interest of the suitors to discourage the opening of biddings, unless upon particular circumstances in the first sale. As no such circumstances appear in this case, the order cannot be granted.

Tuesday,
10th February,

SOMMERVILLE v. BUCKLER.

In a motion for an injunction the plaintiff cannot read affidavits to contradict the answer.

THE defendant in equity had brought an action at law as indorsee against the plaintiff as drawer of bills of exchange to a considerable amount. The bill stated, that these bills were given merely for the payee to get discounted to raise money for the drawer, no consideration being given by him. That the payee indorsed them to the defendant, without consideration, as trustee for himself.

The defendant in his answer denied any knowledge of the original transaction between the plaintiff and the payee, and swore that he had given a full consideration in Bank-notes, &c. at the time of the indorsement.

Burton and *Pemberton* moved for an injunction upon affidavits, which stated the defendant to be in very low circumstances, and by no means capable of advancing the sum; and also set forth several declarations of the defendant, in which he admitted the transaction to be as stated in the bill: they relied on *Isaacs v. Humpage*, 3 Bro. R. 463. as an authority for admitting such affidavits.

Plumer objected, that the injunction could only be obtained upon the merits disclosed in the answer.

The *Court* held clearly that the affidavits could not be read according to the practice of this Court.

WHARTON v. KING.

Same day.

THIS was a cause upon four issues sent from the equity side of the court. The defendant was lord of the manor of *Monkland* in *Herefordshire*, as lessee under the Dean and Chapter of *Windsor*; the plaintiff was a copyholder for two lives; upon one life dropping he offered to renew for two additional lives, and tendered 42*l.* as a fine on the renewal. This was refused. On the death of the other *cestui que vie*, the plaintiff claimed to have a renewal of the estate for three lives, and tendered the same fine. The issues directed were

A custom to renew copyholds for lives can only be on payment of certain fines.

1st, Whether by the customs of the manor the plaintiff was entitled to renew for two additional lives, during the life of the surviving *cestui que vie*, on payment of a fair and reasonable or customary fine?

2dly, Whether he had this right upon payment of a fine of 42*l.*?

The 3d and 4th issues were similar to the 1st and 2d, to try the right to renew after all the lives were expired.

These issues came on to be tried at the last Assizes for *Herefordshire*, before Lord *Kenyon*. The plaintiff proved that the estate in question had been enjoyed by his father and ancestors during a century upon successive grants for lives. Lord *Kenyon* was of opinion, that this was *prima facie* evidence of a right to have such successive renewals, and therefore stopped the counsel from tracing it further back, or from producing similar evidence as to other copyholds of the manor. For the defendant, evidence was offered from the rolls of the manor, to shew that the fines on admissions had been fluctuating according to the number of lives to be filled up and other circumstances; that the fines had sometimes much exceeded two years value of the land, in the admission both to this copyhold and to others, and that there appeared many entries of admissions of strangers to the different copyholds. Lord *Kenyon* rejected this evidence as irrelevant; holding that nothing short of a seizure into the hands of the lord, on the determination of the life-estate of the copyholder, could negative the evidence offered for the plaintiff; that the admissions of strangers might be referable to other circumstances than a right of the lord to refuse to admit the heir, and therefore should be so construed; that the fluctuation and excessiveness of the fines only proved that the lords had acted contrary to law, two years value being the limit fixed by the law, as a reasonable fine

in all cases of admissions to copyholds. 42l. was admitted to be two years value of the estate in question, and accordingly a verdict was found for the plaintiff on all the issues.

A rule having been obtained to shew cause why a new trial should not be granted on the ground of misdirection of the Judge; cause was shewn by

Burton, Serjeant Williams, Mills, and Dauncsey.
It is clear that the lord of a manor in which the copyholds are granted, for life or lives, may be bound by the custom of the manor, to renew either in favor of the heir or the appointee of the copyholder; the fact of such custom is best collected from the practice which has been obtained. If the lord had a right to refuse to renew upon any terms, it is impossible to suppose that the manor should continue to have copyholds, it being the clear interest of the lord to seize them into his own hands. Copyholds imply a holding by custom, and every custom must be mutually binding, and there must be an interest in the tenant independent of the will of the lord. Thus a custom to take fines on every alienation by the lord is bad, because it depends entirely on his will. So a custom for commoners not to turn in their cattle till the lord has turned in his, is also bad. But if the lord might refuse to renew, he might also at each renewal create new rules of holding, and new restrictions of the rights of the copyholders; if the whole estate may be seized into his hands, every thing belonging to it must also be at his disposal; and his rights become inconsistent with the idea of any estate held by cus-

CASES IN THE EXCHEQUER,

pendent of him. Perpetuity of existence of the copyholds seems therefore essential to the right; besides, the fact of the right to renew is found by the jury, and the only question which can remain is, upon what terms it is to take place?

The evidence offered, of admissions of strangers, is a circumstance which, explained by other transactions, might rebut the presumption of right in the heir arising from the general practice; but it was not stated that upon any of those occasions there existed an heir; perhaps the land escheated to the lord; perhaps the heir refused or was unable to pay a reasonable fine. In either of these cases the evidence is immaterial.

The evidence also offered of the quantum of the fines on the several renewals cannot affect the right of renewal. The holding by copy was originally perhaps a mere tenancy at will, and the lords demanded at first arbitrary fines, as the price of continuing the estate or renewing it. In all copyholds where the fine was not fixed by custom, it became a common practice for the lord to exact great and exorbitant fines; but when no certain fine is fixed by the custom, the courts of law interfere to restrain it to that sum which the law considers as reasonable. This doctrine is very ancient, 1 Roll's Ab. 507. *Jackman v. Hoddesdon*, Cro. Eliz. 351, *Hobart v. Hammond*, 4 Co. 27. b. and Moore 622. and was finally settled in *Willow's case*, 13 Co. 1. *Coke's Copyholder* 133. And this doctrine is not confined to copyholds of inheritance. The principle upon which it is established, that the lord shall not be permitted by an

unreasonable fine to destroy the estate or refuse the admission, *Gill Ten.* 239. applies equally to every other species of copyholds. Thus, where copyholder for life is entitled by custom to name his successor, the lord is bound to admit him upon a reasonable fine, according to the custom of the manor, *Ford v. Hoskins, Cro. Jac.* 368. *Crab v. Bales, Noy.* 3. and he has every benefit of a copyhold of inheritance. *Mardiner v. Elliott, 2 Term Rep.* 746. 1 *Brownlow* 132. 2 *Brownlow* 85. 192. 195-6. If the estates of the manor are grantable for two or three lives, and the tenant who ought to renew on the death of one, omits so to do till all are run out, perhaps his estate is gone by reason of the neglect; and this is all that can be inferred from the cases of Lord *Abergavenny* and *Thomas (a)* 1 *Eq. Ca. Abr.* 120. c. 15. (n.) and the Duke of *Grafton v. Horton, 3 Bro. P. C.* 269. Even in copyholds for years, the lord can only demand a reasonable fine on the renewal. *Morgan v. Scudamore, 2 Rep. in Ch.* 134.

What shall be a reasonable fine was considered by the cases already cited, as a point to be fixed by the Court, not by the jury. Yet the exact proportion was long unsettled. *Middleton v. Jackson, 1 Rep. in Ch.* 33. *Popham v. Lancaster, Ibid.* 96. but was at last fixed by Lord *Nottingham*, in *Morgan v. Scudamore*, at two years value, and has continued so ever since. *Astle v. Grant, Dougl.* 724. (n) This sum is fixed by the courts of law, for avoiding un-

(a) See this case, *post.* p. 668. The note in 1 *Eq. Ca. Abr.* is not in the first Edition.

THE EXCHEQUER,

...no accurate reference to the value
... The value of the grant depends
... the customs of the manor; whether
... due on alienations; whether heriots are
... whether the copyholder has a right to
... trees, &c. Yet the fine is fixed according to the
... rent, independent of these considerations;
... in *Morgan v. Scudamore*, the same fine was
... reasonable on a grant for 99 years, although
... benefit was to accrue to the lord during that
... term. But in the present case the lord has greater
... benefit than from any other species of copyholds;
... for besides the fine on renewing the lives, he is
... entitled to a fine on the demise of each tenant.
Coke's Copyholder 128. s. 56. Even supposing the
... lord to be entitled to a larger fine on admission to
... copyholds for three lives than in the case of copy-
... holds of inheritance, still the same rule of confining
... him to a reasonable fine must prevail, whatever pro-
... portion that fine may bear to those in the other
... cases.

If the lord is bound to accept reasonable fines,
evidence of his having demanded and received ex-
orbitant fines, can give him no right against the
general rule of law, unless the fine was fixed by
the custom at a precise sum. Such evidence was
therefore properly rejected at the trial.

Plumer, Leycester, Russel, and Fisher in support
of the rule. By all the books it is agreed, that
there may be copyholds for lives which fall into
the hands of the lord, at the determination of the
grant for lives. *Lit. l. 1. c. 9. s. 73. 2 Blackst.*

Com. 79. *Gilb. Ten.* 239. 2d *Woodeson's Lectures* 45-6. Indeed the grant itself is decisive of this, for it purports to be a grant for lives only, and shall be so understood, unless there be clear evidence of custom to give it greater duration; and the cases cited, in which a custom to renew has been proved, establish the necessity of such custom to prevent the estate from falling into the hands of the lord.

Wherever the lord is bound to renew, and the fine is uncertain, the law interferes to prevent an unreasonable fine, as being inconsistent with the tenant's right to renew, and this reason does not depend upon the particular nature of the estate, but applies even to copyholds for years, where the right to renew is proved, as in *Morgan v. Scudamore*. But where the estate granted is spent, and there remains no interest in the copyholder or his representatives, it is merely optional in the lord, whether he will renew or not. He may take the lands into his own demesnes, or may renew or rather make a new grant for life or lives to the heir or to a stranger, upon such terms as are settled between them, for the purchase of this new grant. Then the first question in the present cause is, whether the evidence given for the plaintiff was sufficient to prove a custom to renew, and whether the evidence offered for the defendant to disprove the existence of that custom ought not to have been admitted?

The nature of the grant, for lives only, throws upon the tenant the *onus* of proving any right in

of the determination of the estate limited on the face of the grant. The only evidence needed is, that of repeated renewals having actually taken place. This alone seems no evidence of the right. It has been the general practice among all considerable landholders in every part of the country, and in every species of landed property, to retain the old tenants and their descendants on the farms which their ancestors have cultivated; but it never was attempted to establish a right against the lords from the continuation of their beneficence. In church lands (which this manor is) it has been the constant practice to renew on payment of the usual fines; yet no right arises from the practice: it is not proved that any one tenant ever claimed to renew as a right: it is not proved, and therefore cannot be presumed, that there exists any custom to make proclamation for the heir to come in (a); and there is no custom to appoint a successor. But supposing that without such auxiliary proof, the mere fact of renewal is sufficient *prima facie* to establish the custom, at least it is capable of being rebutted by other evidence, and if it appears that the evidence offered on behalf of the defendant could in its nature have tended to invalidate the proof of the custom, the refusal to admit it is sufficient objection to this verdict.

Therequiring evidence of a seizure into the hands of the lord, proceeds upon a confusion of the different sorts of copyholds. A copyhold of inheritance

(a) As to the effect of such a custom, see the case of Lord *Abergavenny* and *Thomas*, *post.* p. 669. (n).

is supposed to have passed out of the lord for ever. A failure of heirs or a forfeiture is never presumed. To assert the claim of the lord it is necessary to observe the solemnities required by the custom of the manor upon seizing into his hands. But where only a life interest has passed from the lord, it reverts of course, and no solemnity is requisite. Every entry on the rolls, by which it appears that the copyholds were regranted otherwise than in the course of descent, where there is no evidence of a defect of heirs, is at least a circumstance of evidence to raise a presumption, that the heir was not considered as entitled to renew. This evidence ought therefore to have been admitted as counteracting the effect of those entries where the heir was permitted to renew.

The inference to be drawn from the fact of actual renewals depends upon the nature of the transaction in each case. If the heir claimed and received the renewal as a right, it is evidence of that right; if it was obtained as a favor, or purchased for an equivalent price, this contradicts the existence of the right. In the absence of other evidence of the nature of each transaction, the price given is the best criterion, and we offered evidence to shew that the prices had in general been so large as could only be accounted for by supposing a purchase for a full value at each renewal. In order to establish the contrary it would be necessary to shew, that the renewals had been either upon certain fines, or at least upon fines bearing some certain proportion to the value of the land; like those which are considered as reasonable fines on copyholds of inheritance. In the two cases

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Duke of Grafton v. Horton, and Lord *Abergavenny v. Thomas* (a), it is determined, that the presumption of duration of the estate from the grant itself shall not be rebutted, unless by evidence of instant renewals for fines certain. These cases

(a) The following note of that case was read and given to the Court.

Lord Abergavenny v. Thomas, E. 12 G. 2. In *Canc.*

Before Lord HARDWICKE Chancellor, 21st May 1789.

The plaintiff, as lord of the manor of *Ewey Lacey* in *Monmouthshire*, brought his bill for a discovery of what lands in the defendant's holding were copyhold, and what freehold; and to have a commission to distinguish them, and that he might be let into the possession of the copyhold which were held by the defendant's father, under a copy for three lives, and which lives were all dropt. Defendant by his answer insisted, that by the custom of the manor the heir was entitled to have a new copy for three lives, and so on for ever, paying to the lord a reasonable fine: upon the hearing of the cause there did not appear any evidence to support this custom, and if there had, the Lord Chancellor declared it to be a void custom; he admitted there might be a custom in a manor for the heir of such a copyholder to have a new copy, *paying a fine certain*, but not upon payment of a *reasonable* fine; he said, that originally all copyholds were only *estates at will*, but that in favor of copyhold estates the law by length of time, and by custom, had established their tenures, and had not put them under the will of the lord so long as they kept the custom of the manor, and therefore in the case of copyholders of inheritance, if the custom had not settled any certain fine, the law interposed and prevented the lord from taking more than two years value: but this he said was applicable only to copyholds of inheritance, and that copyholds grantable for lives only, if the fine was not certain, were like leases of freehold lands for lives, and renewable only upon the best terms the party could make; he mentioned the case of the Duke of *Grafton* and his tenants for the manor of *Grafton*, where the copyholds being granted of *lives*, the tenants, as in this case, set up a custom of renewal on payment of a reasonable fine, not exceeding a particular sum; the Lord

consider the circumstance of the fine being uncertain as clearly proved it to have been the subject of a contract at each renewal: at least it is a circumstance of evidence to prove that point, and should not have been rejected.

If the right to renew is proved, still the quantum of the fine remains to be determined. The Courts have fixed two years value as a reasonable fine for copyholds of inheritance. For copyholds renewable for three lives, no sum is yet fixed as a reasonable fine; if the same fine were fixed it would make this a much better tenure than a copyhold of inheritance, for there a fine is due on the demise of each tenant. Besides, it must be held, that upon the first life dropping, the tenant must pay two years value for a renewal, the same on the second, and on the third;

Chancellor King directed an issue to try such a custom, but the House of Lords reversed the decree, because they said that a copyholder in this way, by looking into ancient rolls, and seeing what was the greatest fine that ever was taken, might at any time set up a custom of renewal, paying a reasonable fine not exceeding such a sum, though each particular fine had been settled by agreement.

In another note of this case, also produced in the argument, there is the following addition to the case:

Tamen nota; it was proved that there had been a proclamation in the lord's court for the heir to come in and renew, or shew cause why the lord should not enter upon the estate as his own.

Sed per Canc. That is no proof of a tenant's right of renewal; it was done only in order to prefer the heir before any other in case he will agree for the renewal; and the person who has been steward above twenty years, swears he never knew any tenant insist on such right before the present defendant.

only one fine of two
 supposes the law to pro-
 in calculating what fine is
 the practice in the manor
 renew as each life drops, and to
 on renewing for two or three
 one, the law ought to observe a
 proportion. If such a proportion were in
 the law unreasonable, a custom or usage
 to take such a proportionable fine would
 also unreasonable and void. But in the case
 the *Earl of Bath v. Abney*, 1 Burr. 217. such
 custom was admitted to be good.

MACDONALD, Chief Baron.—This cause arises out of a proceeding in Equity, in which the Court found it necessary to call in the assistance of a jury to satisfy its conscience as to some important facts in the suit. The Court of Equity does this for the purpose of being able to feel itself on the most solid and firm ground in the subsequent discussion of the cause; if from any circumstances there appear reason to believe that the case has not had so full an investigation as would answer this purpose, the security which the Court of Equity seeks from the verdict of a jury fails. It is sufficient at present to say, that the cause does not appear to have had that full and complete investigation.

There are in effect two points to be ascertained by these issues: 1st, Whether by the custom of the manor the plaintiff was entitled to renew at all? 2d, On what terms? To prove the first of these propo-

sitions, the plaintiff produced entries selected by him from the rolls of the manor, in which the heir was allowed to renew. On the other side entries were offered to be produced, where strangers were admitted, and others, where the price paid bore a more near proportion to that upon a purchase than upon the admission to the tenant's own estate. A variety of inferences have been drawn in argument from these entries, and it hardly can be doubted that these might possibly have weakened the effect or explained the meaning of those entries produced by the plaintiff. Indeed, unless all the material entries upon the subject are collected, it seems very improbable that the Court can be sure of the true sense or proper inference of any one.

It is sufficient for us to say, that as the Court of Equity directed these issues for the purpose of satisfying its conscience upon facts which were doubted in the cause, a further inquiry seems highly desirable, so that by a full investigation of the whole matter, that Court may have the security which it is its object to obtain.

The rule was made absolute.

This cause came on to be tried again before Mr. Baron *Thomson*, at the assizes following this term:

The plaintiff shewed from the entries in the Court Rolls such a succession of heirs, admitted as copyholders for life of this tenement, as satisfied the Court of the fact of uninterrupted renewals in favor of the

heir even after all the lives were suffered to run out. He then offered evidence of the same practice having prevailed in the other copyholds of the manor; and that the fine, though not certain, had never in fact exceeded two years value of the estate. He also offered parol evidence to prove reputation of a right in the heir to renew.

This evidence was rejected by the Judge. He rested on the cases of the *Duke of Grafton v. Horton*, and *Lord Abergavenny v. Thomas*, as establishing the principle that a copyholder for lives could not set up a custom to renew, unless on payment of fine certain.

A rule having been obtained to shew cause why a new trial should not be granted, the same counsel appeared on both sides, but the matter having been so recently discussed was not again argued at length. *Leycester* referred to *Allen v. Abraham*, 2 *Bulst.* 32. and 2 *Roll. Abr.* 269. to shew that a custom to renew on payment of a fine not exceeding two years value, is bad.

The case stood over till the 28th *November*, when the opinion of the Court was delivered by

MACDONALD, Chief Baron.—The question now before the Court is, whether the direction of the Judge at the trial was right in point of law. He held that the evidence offered by the plaintiff was inadmissible, as tending to prove a custom not supportable in law; that the certainty of the fine is an essential term in a custom for copyholders for lives

to renew. We are all of opinion that that direction was perfectly right.

The counsel for the plaintiff rest on the evidence as establishing a right to renew, and they contend that the amount of the fine may be rendered definite and certain, by reference to the rule adopted with regard to copyholds of inheritance: they claim in the same manner to renew on payment of two years value, as a reasonable fine. It is therefore to be enquired upon what grounds the courts of law have gone in ascertaining the amount of a reasonable fine for copyholds of inheritance; and what is the import of the term, reasonable fine.—The Courts seem to have considered it in this way. An estate of inheritance in a copyhold implies *vi termini* a right in the heir to come in, not dependent on the will of the lord. An arbitrary claim of unlimited fines is inconsistent with this right. The grant of such an estate must therefore have been accompanied with some agreement, fixing the limits of this claim of the lord. Where the fines have been variable, and no evidence of the actual agreement can be obtained from the practice or otherwise, it becomes necessary for the law to adopt some rules in ascertaining their mutual rights. The Judges have therefore been obliged to consider what would have been a reasonable agreement for such parties to make; and to take that as the criterion of the supposed actual agreement of which all other evidence is lost. In fixing what would have been a reasonable agreement various considerations occur. By granting an estate of inheritance, the lord must be understood to have meant to confer a benefit. The fine reserved must

therefore be less than the value of the admission ; otherwise it would be in fact a purchase *toties quoties* for the full value. On the other hand the fines actually paid must be referred to some right in the lord, and shew that he did not part with the whole beneficial interest. After long struggles and several fluctuations, the courts have at length fixed upon two years value as being the fine most nearly approaching to the agreement which the parties probably made. That therefore is called a reasonable fine.

From this statement it appears that there is nothing by which copyholds for lives can be brought within the principle upon which the Courts have acted with regard to copyholds of inheritance. There is nothing from which the law can clearly ascertain, that any contract ever existed, or ought to have existed between the parties. As the nature of the estate granted does not imply any agreement to renew on fixed terms, such an agreement must be proved by other evidence. The only evidence which can be given of it is the fact of renewals having regularly taken place, according to some certain standard ; that is, upon fine certain. It wants those qualities upon which the presumption arises in copyholds of inheritance, and therefore the principle cannot be carried from the one to the other.

The two cases of the Duke of *Grafton v. Horton*, and Lord *Abergavenny v. Thomas*, fully warrant this distinction. In the first of these cases, the bill at first insisted on a right of renewal on payment of a reasonable fine ; but the counsel for the plaintiff thought that could not be supported ; the bill was amended, and the right was claimed on a fine of a

year and a half's value, as here it is claimed on a fine of two years' value. The evidence was similar to that offered here, except that the fines there had never exceeded the value of the land for a year and a half. Lord *King* directed an issue; but the House of Lords held that there were not terms to support a custom to renew, unless the fine had been certain. This case was cited and the principle adopted by Lord *Hardwicke* in Lord *Abergavenny* and *Thomas*. These two cases are directly in point to the present, and we subscribe both to the reason and to the authority of the decisions.—We are therefore of opinion that the directions of the Judge at the trial were perfectly right.

The rule was discharged.



JONES v. EAMER and Another.

THIS was an action against the defendants, as sheriffs of *London*, for an escape after an arrest upon *mesne process*.

The defendants took no bail-bond, but let their prisoner go at large, on an undertaking to put in bail above, which he neglected to do. On ruling the sheriffs to return the writ, they returned *cepi corpus*, but did not then put in bail to the action. The plaintiff after waiting some days (by which

If a sheriff lets a defendant, arrested on *mesne process*, go at large without bail below, and on being ruled to return the writ, returns *cepi*, but no bail is then put in above, the sheriff is liable in an action of escape, and it is not enough that he puts in bail when ruled to bring in the body.

a term was lost) ruled the sheriffs to bring in the body, and at the same time served them with process in this action. The sheriffs put in bail at the time limited by the rule for bringing in the body. *

On this case the Lord Chief Baron, before whom the action was tried, directed a verdict for the plaintiff, which was accordingly found.

Marryat, having obtained a rule to shew cause why a new trial should not be granted, argued thus in support of it: The mere circumstance of having let the defendant go at large is no ground to maintain an action against the sheriff. *Atkinson v. Matteson*, 2 Term Rep. 172. The Sheriff of Nottingham's case, Noy 72. *Hawkins v. Plomer*, Black. Rep. 1049. It is sufficient if the sheriff have him to produce at that time, when by the rules of the Court, he is bound so to do, and if bail is put in above, that is a production of the body. The question is, at what time that is to be done?

In contemplation of law the sheriff is bound to return the writ on the return day, and if he does not he is entered in *misericordia*, but that has long been a mere form. The Courts do not wish the sheriff to take any steps in the cause, unless the plaintiff shall shew his desire to proceed, by taking out a rule to return the writ, and if that is complied with, and it is returned *cepi*, the plaintiff must then proceed to rule the sheriff to bring in the body. If the sheriff does so, he complies with the rules of the Court, and no action lies against him, although

he has permitted the defendant to go at large after the arrest. *Ellis v. Yarburgh*, 2 Mod. 177. *Freeman* 219. *Posterne v. Hanson*, 2 Saund. 59. *Cook v. Brockhurst*, Fort. 369. It may be objected, that in these cases the sheriff had taken bail, which he has not done here. But that circumstance is immaterial as between him and the plaintiff. The statute of 23 H. 6. is only meant as a benefit to the defendant to prevent vexation by the sheriff, and leaves the plaintiff in the same situation as he was before (a), *Freem.* 219. and on the same principle it is held that the sheriff is justified in taking insufficient sureties or only one. 2 Saund. 60. *Fost.* 369. Yet the act requires "reasonable sureties of sufficient persons." If then the sheriff had taken one nominal bail, the rendering the body upon the rule to return the writ would have been sufficient. That form as far as regards the plaintiff is immaterial, and the same must be the time of rendering in those cases where no bail is taken.

Supposing the sheriff irregular, yet the plaintiff must shew that he is damnified by the irregularity before he can support this action. The omission of an immaterial form is no damage to the plaintiff, if the defendant is brought in as soon as the plaintiff could have called upon the sheriff to produce him, if the form had been complied with. Besides, the only damage to him is the loss of a trial in the term; but if he had not bin by and neglected to rule the

(a) The statute provides, that "if the sheriffs return *cepi corpus* they shall be chargeable to have the bodies of the said persons at the return of the said writs, in such form as before the making that act."

sheriff, the trial would have been had in the term, and as soon as it could have been, if the defendant had been brought in on the return day of the writ.

Plumer and *Bailey* for the plaintiff.—Before the statute 23 H. 6. the sheriff was not compelled to let the defendant go at large on any security. That statute was introduced for the benefit of the defendant, to compel the sheriff to take bail; and accordingly the Courts have held, that where that act is complied with, the plaintiff has no action against the sheriff for the escape, or for falsely returning *paratum habere*; the cases where this rule has been followed are expressly founded on that statute, as the justification of the sheriff. *Page v. Tulse*, 2 Mod. 83. *Boles v. Lassels*, Cro. El. 852. *Noy* 59. *Barton v. Aldsworth*, Cro. El. 624. *Ellis v. Yarboro*, 1 Mod. 227. 2 Mod. 77. According to the report of the latter case, in 1 Mod. it is expressly declared, that if no bail were taken a different rule would prevail. And the same distinction is taken in *Allen v. Robinson*, 1 Sid. 22. *Parker v. Welby*, 1 Sid. 439. 1 Vent. 85. *Benson v. Welby*, 2 Saund. 154. *Langton v. Gardiner*, Moor 428. Cro. El. 460. *Gilb. C. P.* 22.

It only remains to be enquired, what is the time at which the body of the defendant ought to be brought in; whether at the return of the writ, or upon the expiration of the rules upon the sheriff. In the Sheriff of Nottingham's case, *Noy* 72. *Hawkins v. Plomer*, Bl. R. 1049. *Atkinson v. Matteson*, 2 Term R. 172. it is held that the return of the writ is the period. In *Merryman v. Carpenter*, 2 Str.

1262. it is held that the plaintiff need not take any steps to quicken the sheriff or bail below, before taking an assignment of the bail-bond, and in *The King v. The Sheriff of Cornwall*, 1 Term R. 552. it is held that the sheriff is guilty of an omission in not returning the writ, and that the rule to return it is founded upon and must be consequent to that omission.

In *Murray v. Durand, Espin. Ca. Ni. Pri.* 87. Lord *Kenyon* was of opinion, that, but for the actual justification of bail interfering, the action would lie against the sheriff; he calls it there "in fact an action for not taking a bail-bond."

MACDONALD, Chief Baron.—This case is decided by *Ellis v. Yarboro*; the principle is there recognized, that no action lies against a sheriff for an escape, where he takes bail, because he is compellable so to do; but if he does not take bail, nor has the body at the return of the writ, an action does lie. This rule is followed in the decision of that case, and has ever since been considered as the law upon the subject.

The rule was discharged.

DOES IN THE EXCHEQUER,

WALKER v. DRAWATER.

the writ
is denied—
but it
not taken out
and executed
after his death,
is bad. 2u.? **A** RULE was obtained to shew cause why the execution in this case should not be set aside. The *fi. fa.* was tested of last *Hilary* Term, before the death of the defendant, but was not in fact taken out till after it, in the Vacation following.

Espinasse shewed cause against the rule; he insisted that the goods were bound by common law from the teste of the *fi. fa.* *Anon. Cro. El.* 174. *Parkes v. Mosse, Cro. El.* 181. 1 *Rol. Abr.* 893. (A) 2, 3. The statute 29 C. 2. c. 3. provides, that a writ of execution shall only bind from the time of the delivery to the sheriff, but that statute is expressly made for the protection of purchasers only (s. 13.); and accordingly it has been decided in several cases, that, as between the parties themselves, the goods still continue to be bound by the teste, *Houghton v. Rushby, Skin.* 257. and Dr. *Needham's* case there mentioned, where the same decision was afterwards adopted by Lord Holt. So, *Anon.* 2 *Vent.* 218. *Farrer v. Brooks, 1 Mod.* 188. *Robinson v. Tonge, 3 P. Wms.* 399. *Finch v. The Earl of Winchelsea, Mr. Cox's note, Ibid.* *Springer v. Somerville, Bunb.* 271. The only case which seems at all to weaken this rule is *Heapy v. Parris, 6 Term Rep.* 368. but that is very distinguishable, it goes upon the circumstance of the judgment not being docketted pursuant to 4 and 5 *W. and M. c.* 20. The Court were of opinion, that the executor was

entitled to have that notice of the existence of the judgment, before it could be put in force against him; here there is no such objection. Besides, that was a case between two creditors contending for priority; this is between a creditor and the executor.

Shepherd in support of the rule. The *teste* of the writ is fictitious, and may, as in all other cases, be controverted where any thing turns upon it. The real date is, the delivery to the sheriff. If the execution bound from the *teste*, the goods would be bound by it, and all other executions of subsequent *testes* would be postponed; but the only question to ascertain their priority is the time of the delivery to the sheriff for the purpose of being executed; for it has even been held, that if no warrant is taken out to enforce the execution, a subsequent execution sued with diligence shall be preferred. 5 *Mod.* 577. The executor is in truth the trustee for all the creditors, and if the goods are not bound as against creditors at the time of the death, neither can they against him. This is the principle upon which the Court went in *Heapy v. Parris*. The Court there say, "The moment a party is dead, "the rights of his creditors are fixed." The plaintiff here had no vested right in the goods at the time of the death, for another creditor might have gained a priority. Then he must resort to his *scire facias*, and the executor has a right now to pay him, among the other judgment creditors, in what order he thinks proper.

The case standing over to this day, the judgment of the Court was delivered by

M^ACDONALD, Chief Baron.—The question in this case is, whether an execution tested before the death of the defendant can be taken out and executed after his death; or whether a *scire facias* ought not to be sued upon it? The point seems to us to be settled by the case of *Heapy v. Parris* (a).

The rule was made absolute.

(a) In *Heapy v. Parris*, the writ of execution was tested as well as sued out *after* the death of the defendant.—In *Michaelmas Term 37 Geo. 3.* a case similar to *Walker v. Drawwater* came to be argued in *K. B.* ——— *v. Langmead*, where the Court, upon seeing the note of this case in the *Exchequer*, observed that distinction between it and the case of *Heapy v. Parris*, and considering the decision here to have proceeded on a mistaken view of the latter case, expressed a contrary opinion. The case went off upon another ground.

Thursday,
11th February.

FRANKLIN v. GOOCH.

Setting out of
tithes cannot be
dispensed with,
even although
the uncertainty
of the weather
prevents the
corn from being
put in shocks at
all.

THE bill was for an account of tithes of wheat in a particular field, in the year preceding the filing of the bill. It appeared that the wheat had remained standing very long from the wetness of the season, and the weather continuing very precarious, the defendant was obliged to cut small parcels of it at a time, and carry it home immediately when a cart

load was cut. He gave notice to the clergyman that he was going to cut and carry what part of it he could, while the weather was fair. The plaintiff attended to see it tithed, and the defendant proceeded to fill a cart load, throwing nine sheaves into the cart, and laying aside the tenth sheaf for the tithes. The plaintiff refused to take his tithes unless he saw the whole tithes of the corn cut down regularly set out before any part should be carried away; he did not object to the size of the sheaves thrown aside for him, and they were sworn to be equal to the others.

Partridge contended that the clergyman is in all cases entitled to have his tithes set out, and relied on *Tenant v. Stubbins*. (*ante*, p. 640.)

Plumer and *Richards*, for the defendant, insisted that the farmer was justified by the necessity of the case in omitting the usual form of setting out the tithe. The mode of setting out the tithe of each article is adapted to the convenience of agriculture, and of course must shift with circumstances; it never being intended that the farmer should adopt an unprofitable mode of husbandry, for the purposes of tithing. *Collyer v. Howse*.^(a) Besides the sheaves offered being the full tithes, the refusal to accept them, upon a formal objection, is such conduct as a Court of Equity ought not to countenance.

MACDONALD, Chief Baron. The case made by the plaintiff is extremely unfavorable. The farmer trusted to his not objecting, and acted upon a seeming ac-

(a) See *ante*, vol. 2. p. 481.

quiescence, and the objection at last is not grounded upon any pretence of unfairness in the tithes offered him. In a case so vexatious, and so unseemly in a clergyman, the Court would be glad to find any sufficient ground, from the state of the weather at the time, to justify the mode of tithing adopted, and to dismiss the bill with costs; but the conduct of the farmer in not setting out the tithes, was not strictly correct, and cannot be supported. An account is therefore unavoidable, but without costs.

Serjeants Inn
Hall.
Monday,
22d February.

HART v. DURAND.

A testator gave a legacy to "every of the sons and daughters of his late cousin," his cousin left one legitimate daughter, and one son and one daughter illegitimate; the latter are not entitled under the will, nor is evidence admissible of the intention of the testator.

THE testator by his will gave "to every of the sons " and daughters of his late cousin *J. D.* 100*l.*" *J. D.* had left only one legitimate daughter and two illegitimate children, a son and a daughter. The Deputy Remembrancer refused to admit evidence of the testator's intention to comprehend the illegitimate children in the bequest. On exceptions to the report,

King insisted that the words of the will, "*the sons* " and daughters," could not apply to a single daughter; that this was an *ambiguitas latens* which let in evidence of the persons really designed. It is clear that bastards may take by a general devise to all the natural children of *A. B. Metham v. Duke of Devonshire*, 8 *Vin.* 321. and if the words of the will

cannot be otherwise satisfied, bastards must equally take under the general name of sons and daughters. *J. D.* being dead, the testator must be supposed to have known the specific objects of his bounty, and evidence should have been admitted to shew whom he meant.

Plumer and Cox on the other side.

MACDONALD, Chief Baron. If this were allowed, it might equally well be attempted in every case of a devise to the children of *A. B.* to include illegitimate children, by parol evidence of intention. Besides, the claimants are a son and daughter; these, together with the legitimate daughter, will not satisfy the words "*sons and daughters*;" and therefore the pretence of admitting parol evidence fails.

THOMSON, Baron. In order to admit this claim, the words must be construed as extending generally to all sons and daughters, whether legitimate or not. Then it would be impossible to exclude any other bastards of *J. D.* who may possibly hereafter claim. This construction would be monstrous, where there exists one that answers the legal description of the persons to take.

The report was confirmed.

BEACHCROFT v. GORDON and DE CONSTANT.

GORDON sued at law on a policy of insurance, averring that he had insured for his principal *De Constant* the party really concerned. The underwriter filed a bill for a discovery and injunction. *Owen* now moved for an injunction on affidavit of *De Constant* residing abroad. It was objected that notice of the motion ought to have been given to *Gordon*. *Owen* contended that this was unnecessary, as it appeared by the declaration that *De Constant* was the real plaintiff at law; and therefore it was like the common case of a plaintiff residing abroad.

The officers agreed that, in practice, no notice is given.

THOMSON, Baron, thought that such a practice was improper; for the making *Gordon* a party in Equity shows you cannot obtain an injunction against him behind his back. If he has no notice of this motion, he may as well not be a party.

MACDONALD, Chief Baron, thought that from some particular circumstances which appeared in the case, notice ought to be given.

It was directed to be moved again with notice.

HARE v. GROVES, and Others.

THE defendant *Groves*, in 1786, leased to the plaintiff *Hare* (a brewer) an inn and out-houses, with about ten acres of ground on *Woolwich common*, for twenty-one years, (determinable at the will of the tenant, at the end of seven or fourteen years,) at 100*l.* a year; the plaintiff binding himself by an express covenant for the due payment of the rent, and to keep and leave the premises in repair, *damage by fire only excepted*; and the landlord to have a right of entering to inspect the state of the premises. In 1792, the plaintiff underleased to the defendants *Harford* and *Taylor*, brewers, they indemnifying him from all demands of rent.

A tenant covenanting to repair, damage by fire only excepted, continues liable to payment of rent, notwithstanding the premises are destroyed by fire.

The tenant of these premises, under *Harford* and *Taylor*, becoming insolvent, and the house remaining unoccupied for a considerable time, they afterwards underleased to the *Polygraphic Society* (for imitating paintings,) who made use of it for boiling and preparing oils and varnish, and for painting their pictures, and other purposes of their manufacture: in the course of which, the house was rendered totally unfit for an inn or dwelling-house, the floors being all stained, and most of the windows shut up. It was also necessary to keep such excessive heat in the rooms, by furnaces in each, that the hazard to the building from fire was considerably increased; and no person lived in the house.

In 1793, the house was consumed by fire; the stables and outbuildings were not damaged. The plaintiffs soon afterwards applied to the defendant *Groves*, to rebuild the premises, or to accept a surrender of the lease. *Groves* refused to do so, and commenced an action at law, on the covenant, for nonpayment of rent accruing subsequent to the fire. This bill was filed for an injunction, and to compel *Groves* either to accept a surrender of the lease, or to rebuild the premises.

Burton and *Cooke* for the plaintiff insisted, that the claim of the landlord, though good at law, (*Belfour v. Weston*, 1 Term Rep. 310.) was yet against an established rule of equity. The first case in which this was so decided, was *Brown v. Quilter*, Amb. 621. Lord *Northington* there held, that, by the equitable construction of such a covenant, the tenant is not bound to pay rent for a house which no longer exists, and which he is not bound to rebuild. The same construction was adopted by the same Chancellor, in a subsequent case of *Cambden and Morton*, and by Lord *Bathurst* in *Steele v. Wright* 1773 (a). And this doctrine in equity has been recognized by Lord *Kenyon*, when deciding the contrary to be the rule of common law. *Weigall v. Waters*, 6 Term R. 489. *Belfour v. Weston*, 1 Term R. 310. If this be the regular and fixed construction of such a covenant, in courts of Equity, nothing dehors the lease can vary it. If the tenant has either made an improper application of the premises to an use by which the hazard from fire is increased: if by his negligence, or

(a) Cited in *Doe v. Sandham*, 1 Term Rep. 700.

even by design, the premises are burned, the landlord has his remedy by an action of waste, or otherwise; but this cannot give a right to recover rent for that which does not exist.

But, in fact, no improper use has been made of the premises, to the extent of fixing the tenant with responsibility for the loss. It was not stipulated in the lease that the house should continue to be used as an inn, nor is it always in the power of the tenant that it should, as the justices may refuse to renew the licence. To convert it to a manufactory, is the most obvious and probable use of such a building; and there are many trades and manufactures in which the danger of fire is as much increased as in the present; at least the court cannot decide it to be uncommonly hazardous, without an issue.

But the landlord has precluded himself from this defence. He was a builder living in the neighbourhood. He has seen this change of the use of the building, and might at any time enter under the covenant to inspect the state of the premises; if waste was committed he might re-enter it, either at common law, or by virtue of his covenant; by lying by for so many years, he has encouraged us not to object to the use the premises have been put to by our under-lessees, and is therefore to be considered as having given a licence to this use of the premises.

Plumer and Stanley for the defendant *Groves*. The decision in *Brown v. Quilter* by no means establishes the construction contended for by the plaintiff. If that construction were to hold, the lessee would

CASES IN THE EXCHEQUER,

... says and it his interest to burn the house, in order to get quit of the rent, after letting the premises become untenable for want of repairs. It is not there held that the landlord is bound to repair on such a covenant, for he may elect to accept a surrender of the lease. The idea there thrown out, that the thing leased is gone by the fire, is not true in fact in either case; for there the tenement remained so valuable that the lessee would not surrender, and here the out-houses and land are still of considerable value. If one of the out-houses, of trifling value, had been consumed by fire, that would have been, like this, a partial loss; and the tenant would equally have been entitled to compel the landlord either to rebuild it, though not bound by the covenant so to do, or to accept a surrender of the whole lease, however advantageous it might be to the landlord.

It may well be questioned, therefore, whether the opinion of Lord *Northington* in *Brown v. Quiller* is well founded. The rule of law is clear that the lessee must abide by his covenant for the payment of the rent in the event which has happened; and it is contrary to the general spirit of equity to change the effect of a contract from that which the parties themselves here entered into. That case was not decided according to the opinion of Lord *Northington*, for the tenant refused to surrender his lease, and his bill was dismissed. The other cases mentioned are not in print, nor is any note of them produced; those determinations may have rested on special circumstances; the *obitum dictum* of Lord *Kenyon* cannot give much weight to the argument, as he was then determining the contrary to be the rule of law, and

was not considering the case upon the grounds of equity. In the late case of *Waters v. Weigall* (a), in this court, the rule was not acted upon as a fixed principle of equity.

In this case the equity, if any, is rebutted by the conduct of the lessee in the use to which the premises have been applied. The ground upon which *Brown v. Quilter* proceeded, was, that the parties, by exempting the tenant from liability to rebuild in the case of fire, had agreed to consider that in the same light as if the premises had been swallowed up by the sea. This however supposes that the accident happens without default of the tenant. In the present case, the tenant, if not guilty of actual fraud, at least cannot be considered as free from blame. Suppose the landlord to have subjected himself to the risk of loss by fire; the risk he has agreed to stand to is that incurred in the occupation of the premises as an inn, and the rent is probably proportioned to the extent of this risk. If a common insurer had agreed to take the same risk upon himself, there can be no doubt that a change in the lading of a ship, or in the use to which a house is applied, by which the danger is materially increased, will avoid the insurance; the use of the premises might be changed, but not so as to increase the risk run by the landlord.—By underleasing to the *Polygraphic Society*, the tenant probably got an increased rent by subjecting the house to greater risk, and is therefore receiving the premium for the additional risk which the landlord incurs. It is also in evidence that no

(a) *Vide ante*, vol. 2. p. 575.

person slept in the house, and the fires were continued all night without any person to watch them. The care ought to be increased with the risk, otherwise the tenant is guilty of that degree of negligence which is viewed by the law in the same light as actual fraud, and which avoids every equity that the plaintiff might otherwise be entitled to set up.

Burton in reply contended, that the relief given by Courts of Equity in cases like the present was similar to the jurisdiction exercised in cases of penalties of bonds, mortgages, and other contracts, which are construed at law according to the express agreement of the parties; but, in equity, the consideration given, and the fair recompence to be obtained for it, are the principal rules in estimating the claims of the parties. It is unjust that the tenant should pay rent for a house which does not exist; unless, by agreeing to repair, in such an event he precludes himself from the general equity.

MACDONALD, Chief Baron. The present question is obviously one of that description upon which a Court of Equity ought peculiarly to pause. The question is of great importance, from the generality of that kind of covenant which gives rise to this suit: and it acquires additional consequence, because it calls upon a Court of Equity to fix the boundaries to its own power and jurisdiction in interfering in the contracts of individuals.

It is clear that at law the tenant is bound, by the legal construction of this lease, to pay his rent during the continuance of the term, notwithstanding the

event which has taken place. Equity is called upon to interpose, to prevent the operation of this legal construction, upon the ground that the loss ought in such cases to fall upon the landlord instead of the tenant: we are called upon to relieve from the burden of this misfortune, one party who is liable at law to bear it, and to lay it upon another innocent party who is not otherwise liable.

It will be material to consider how far this doctrine might be pushed, upon the same reasoning adduced in support of the present claim. If the thing leased is destroyed or materially damaged by floods (a), or tempest, or any other inevitable accident, the same equity might be insisted upon.

It may well be questioned whether there is any real resemblance in the present case to that of an eviction of the tenant by title paramount; to which Lord *Northington* has assimilated it as the groundwork of his opinion in *Brown v. Quilter*. The tenant can only be evicted where the title of the landlord was originally bad, where he never had in truth any thing to demise, and the pretending to do so was a fraud upon the lessee. In the present case there was a full capacity to demise the thing leased, on any terms which the parties might agree upon. The possibility of destruction by fire was in their contemplation in making the lease; and it would have been very easy to provide against the payment of rent in such an event, or for apportioning the rent on a partial loss, if such had been the intention of the parties: on the contrary, the lessee has

(a) See *Conter v. Cummings*, and *Harrison v. North*, 1 Ch. Ca. 33.

expressly stipulated to pay the rent during the term at all events; and it is very difficult to say that that was not the intention. This therefore is materially different from the case of penalties relieved against in equity; the ground of that relief is that the actual payment of the penalty was not the intention of the parties, and the contract points out the real interests which are meant to be taken under it. (a) Accordingly, where, by the nature of the demand and of the penalty, it seems probable that the actual payment of the penalty was the intention of the parties, Equity refuses to interfere, as in *Peterson v. Rolfe* (b), and that class of cases.

Perhaps this case may be distinguished from that of *Brown v. Quilter*, so as not to clash with it. In *Brown v. Quilter*, the landlord had insured the house; by its being burned he became entitled to the insurance, and therefore had in his pocket the value of the thing which was the subject of his contract with the lessee. As to him therefore no loss had happened. There might be some equity to say that he should not keep the house, or its value, and receive the rent also, but should either put it down again for the use of the lessee, or remit the rent; this perhaps may make a distinction between that case and the present, so that a different decision may be adopted here, consistently with the facts of that case. —The two other cases decided, the one by Lord *Nottingham*, the other by Lord *Bathurst*, are men-

(a) See *Sir H. Peachy v. The Duke of Somerset*, 1 *Str.* 453. *Sloman v. Walter*, 1 *Bro. Rep.* 419.

(b) 6 *Bro. P. C.* 470. See also *Hardy v. Marton*, 1 *Bro. Rep.* 419. and the notes in 1 *Fonblanque's Treatise of Equity*, 141. 387-8-9.

tioned as being similar to that of *Brown v. Quiller*, and probably may in the same manner be distinguished from the present. And the question does not appear to have come directly before the Court in any of the other cases which have been mentioned. The dictum in *Weigal v. Waters*, although from an authority so highly respectable, is not such as to preclude further investigation upon the subject.

Then supposing the principle of equity contended for by the plaintiff to be clearly fixed, the defendant raises another objection to his claim, peculiar to the present case, from the conduct of the plaintiff himself in the manner of occupying the house. It is argued that a tenant, occasioning the loss of the house by his own misconduct, is not entitled to the general equity; and it is insisted that the plaintiff is culpable in converting the premises to an use by which the hazard of fire was increased; and in not proportioning his care to that additional hazard. It is certainly an important question, what shall be the effect of such a change in the use of a building where the lease has not specified any particular mode of enjoyment. There is also some contradiction in the evidence, with regard to the quantity of the increase of the hazard, and of the care taken to prevent its effects. It will be necessary for the Court to look into the case before we give our decision.

MACDONALD, Chief Baron, delivered the opinion of the Court.

Serjeants Inn
Hall.
25th February.

In deciding this cause, it is material, in the first place, to ascertain how the rights of the parties stand

at law, before we proceed to consider the grounds of equitable interposition, upon which this Court is now called upon to vary those rights.

By the deed which is produced, it appears that the plaintiff has bound himself for the payment of the rent by a positive covenant, and without any restriction. The exception in favor of the lessee, that he shall not be bound to repair in case of fire, is merely negative. It saves him from one of the duties to which he would otherwise have been liable in that event, under the general covenant to repair: this does not necessarily excuse him in the same event from all the other duties to which he has made himself liable; and there does not seem to be any immediate connexion between this saving and the covenant for payment of rent.

It is argued that the nature of the subject raises that connexion. I take the distinction to be this: Where, upon a covenant by one party, the law raises another mutual and correlative covenant, the one becoming impossible, the other also is gone. But where the covenants both arise out of the express agreements of the parties, and are not described as dependent the one upon the other, although the performance of the one becomes impossible, yet the force of the other remains. And this has been repeatedly decided in cases resembling the present. In *Dyer* 33. *a.* and in *Paradine v. Jane*, *Aleyn's Rep.* 26. it is ruled that where a lessee covenants to repair, destruction by lightning, or the King's enemies, does not excuse. So, in the case at bar, the lessee would not only have been obliged to pay rent in the event that has happened, but

to repair also, if that were not expressly excepted. In *Monk v. Cooper*, 2 *Ld. Raymond* 1477. also reported, but less fully in 2 *Stra.* 763, where the covenant to repair was with the same exception as here, it was held that the lessee continued liable to payment of rent after destruction of the premises by fire. The same doctrine followed in *Bel-four v. Weston*, 1 *Term Rep.* 310. and in *Pindar v. Ainsley*, there cited by Mr. Justice *Buller*, and again in *Doe v. Sandham*, 1 *Term R.* 705. and Mr. Justice *Buller* there observes, that the cases cited from Courts of Equity, in which a different rule prevailed, must have turned upon particular circumstances. These cases have clearly established the right of the landlord to recover at law on the covenant for rent.

In Courts of Equity the decisions have not been so uniform. In the case of *Harrison v. Lord North*, 1 *Ch. Ca.* 83. the Chancellor seemed inclined to interpose in favor of a lessee, to prevent his being liable to payment of rent, where the premises had been taken from him by the King's enemies; but it does not appear that he in fact interposed in consequence of this opinion: And in *Carter v. Cummins*, cited *ibid.* the Lord Chancellor refused to relieve the lessee from payment of rent, where the thing demised was carried away by a flood.

In the case of *Brown v. Quilter*, in *Ambl.* 619. Lord *Northington* proceeds upon an opinion that, even at law, the right of the landlord to recover rent in a case like the present would be doubtful; and he considers it as similar to the case of an

eviction; but there does not appear to be any analogy between the cases. Where the tenant is evicted upon a title contrary to that of his landlord, it is ascertained that the lessor demised what in truth did not belong to him: In that case he has no claim to have a continuance of the recompence for that which in fact was never his. Here, on the contrary, the question turns upon the effect of a covenant entered into by parties fully competent to contract concerning the subject of the demise, where the value of it is destroyed by a subsequent accident. Perhaps, however, the circumstance of the landlord having in that case recovered the value of the house against the insurers, may distinguish it from the present. The same circumstance also occurred in the case of *Camden v. Morton*. Of *Steele v. Wright* we know nothing more than what may be collected from the loose mention of it in argument in *Doe v. Sandham*. It is there considered as following the two decisions of Lord *Northington*, and probably may have resembled those cases in this circumstance also. As to the dictum of Lord *Kenyon* in *Doe v. Sandham*, it merely amounts to this, that if there is any remedy at all, it must be in equity; it negatives the remedy sought at law, but does not affirm the existence of an equitable claim.

In the present case there is not any one circumstance which was not in the contemplation of the law, when the rule, which still holds, was established; there is nothing to affect the conscience of the party. In *Brown v. Quiller*, the circumstance of having recovered the value from the insurers

might be considered as affecting the conscience of the lessor, so as to take that case out of the general rule; here the point comes before a Court of Equity with the same naked circumstances which have already been decided at law, and therefore the general rule must prevail, that equity follows the law.

By the misfortune which has happened, both these parties are damnified. The lessee is owner of the house during the lease, the lessor after its expiration; by the fire each loses his interest in it; what equity is there to throw the whole of the burden upon one of the parties, whose equity is certainly equal to that of the other?

The Court ground their decision, therefore, not upon any evidence of the particular circumstances of this case, or of the dangerous use to which the house was applied, but upon the general ground that the equity of the parties is equal, and the rule of law must prevail.

The bill must be dismissed; but, as there are authorities which seem to warrant the plaintiff in coming here, let it be without costs. (a)

(a) His Lordship also observed, that in the investigation of this case he had found much assistance from a note upon the subject by Mr. *Fonblanque*, in his *Treatise of Equity*. See *vol. 1. p. 336*.

FOLKINGHAM v. CROFT.

On an agreement for a lease, "with all usual and reasonable covenants," a covenant not to underlease or assign is implied where the custom of the place is not generally against it.

THIS was a bill to have specific performance of an agreement for the lease of a public house at *Leeds*. The agreement was for a lease, "with all usual and reasonable covenants, commonly inserted in leases of the same nature." The plaintiff, the lessee, tendered a lease to be executed by the defendant. The defendant objected to the draught for not containing a covenant, on the part of the lessee, not to assign or underlease without licence. By the evidence it appeared, that there was no regular local practice upon the subject, it being equally common in such leases to insert or to omit the covenant in dispute.

Plumer and Johnson, for the plaintiff, relied on *Henderson v. Hay*, 3 Bro. R. 632.

Burton and King, on the other side, cited *Morgan v. Slaughter*, 1 *Espinasse's Cases at Ni. Pri.* where Lord *Kenyon* ruled this to be an usual covenant.

The case having stood over for judgment from *Michaelmas* Term, the opinion of the Court was this day delivered by

MACDONALD, Chief Baron.—If this case came before us without any authorities, we should not find

much difficulty in deciding upon it; the covenant in question is very old in the practice of the law, being recognized as well known in Lord *Coke's* time; and it is now so generally adopted, that a lease made without such a covenant would be considered by every body as improvidently drawn.

A doubt is, however, introduced by the opposite decisions which have taken place upon the subject. In *Henderson v. Hay*, Lord *Thurlow* considers it necessary, by the terms of the agreement, that the covenant inserted should be incidental to the lease, that is to say, that it should be quite of course in such a lease; and his decision finds that this covenant is not incidental. The other case was decided by Lord *Kenyon*, having that decision before him; and, therefore, although only a case at *Nisi Prius*, is entitled to great attention.

Upon the whole we are of opinion, that this covenant, being now so long established in common practice, may fairly be considered as a common and usual covenant to be inserted in leases: The bill must, therefore, be dismissed; but, as the opposite decisions upon the subject raised a case of fair doubt for the plaintiff to bring into court, he ought not to pay costs.

NAGLE *v.* EDWARDS.*Same day.*

Variety of inconsistent defences.

THE plaintiff sued as lay impropriator of the parish of *L.* in *Wales*, for tithes, hay, and agistment.

The defendant set up ten or twelve defences to this claim, several of which were inconsistent and contradictory. A doubt at first arose, whether this should not be considered by the court as an abuse of their pleadings, and as such be rejected as not being a proper defence; and it was insisted that this ought to be done, because the plaintiff is distracted by the multifarious defence, and does not know to what his evidence or the arguments of counsel should apply.

But it appearing that the plaintiff had not been guilty of any intentional misconduct, and that it wholly arose from mistake in his legal advisers, the Court went into the defence.

Partridge and *Hall*, for the defendant, insisted upon two grounds of defence :

Mere non-payment of a particular species of tithes is no evidence against a lay rector of a conveyance of that tithe.

1st. That from tithes of hay and agistment never having been paid to the rector within memory, a conveyance of them to the landholder should be presumed.

2d. A *modus in non decimando* for hay and agistment, covering this and many adjoining parishes, being a very large tract of country, of which the tithes were formerly vested in the Abbey of *L.*

A prescription *in non decimando* can only be set up for a large tract of country, well known as a distinct district.

As to the first, they contended that this was not a claim of a *modus in non decimando*, and therefore, not within the decision of the *Bury St. Edmunds v. Evans*, and the other cases upon that subject. Those decisions went upon the ground that, in order to found a prescription, the presumption must be of a right prior to the dissolution of the monasteries. *Com. R.* 651. But since the ecclesiastical property has come into lay hands, its nature is changed; by 32 *H. 8. c. 7.* it is become like any other lay property, is transferred by the same conveyances, and its title is tried by the same actions as any other incorporeal hereditament. The effect of length of time to support possession, as evidence of some grant or other title, is considered by Lord *Mansfield, Coup.* 109., as a general rule of law; accordingly it has been applied, in several cases, to claims of tithes as well as other property. *Scott v. Airey (a)*; *Mawbey v. Edmead*, &c. By 21 *J. 1. c. 2.* 9 *Geo. 3. c. 16.*, even the claims of the crown are lost by 60 years nonclaim.

Whether such a prescription can be pleaded against payment of tithes due of common right. *2u.†*

As to the second point, they argued that a custom *in non decimando* for a large tract of country is good. *Doct. & Stud. c. 55. p. 147.* 2 *Inst.* 645. *Hicks v. Woodson*, 4 *Mod.* 336. *Carth.* 390. 2 *Salk.* 655. *Skin.* 560. Those authorities go to all sorts of tithes, to those due of common right, as well as

(a) *Vi. ante*, vol. 1. p. 321.

others. The distinction is, that a tract of country may prescribe; an individual, or even a parish, cannot. 1 *Barnardiston, K. B.* 71.

Plumer and *Richards*, for the plaintiff, argued, that the claim of exemption by presumption of a grant was only another mode of stating a *modus in non decimando*, for wherever the evidence would support such a *modus*, *a fortiori* it must support the present defence; and the effect of such a defence is, therefore, determined by the case *Bury St. Edmunds v. Evans*. The case of *Scott and Airey* does not apply to the present; that was a dispute between two claimants of tithes, each deducing a title to the tithes distinct from the title to the lands, and the claimant, who happened also to have the land, was in possession of all the tithes, and demised them to the tenant together with the land; here the rector has received all the tithes that have ever been taken, and it is clear that he has a *prima facie* right to all, whether he has had actual perception of every species or not. *Benson v. Olive, Bunb.* 284. The defendant does not pretend that his lease contains a demise of the tithes of hay and agistment; his landlord has never demanded those tithes of him, and therefore neither of them has possession to set up against the *prima facie* claim of the rector, as in *Scott v. Airey*.

As to the other point, they insisted that a *modus in non decimando* could only be claimed in a large and known division of the country, as the wild of *Kent*, or of *Sussex*, or for a hundred or county, but not for a parish, or for a few contiguous parishes; and the case cited, *Hicks v. Woodson*, supports this distinction.

By that case, as reported in 2 *Salk.* 655. 1 *Ld. Raym.* 137., it is decided, that even a county or hundred cannot prescribe *in non decimando* for things which are *de jure* titheable, and Dr. *Burn* draws that conclusion from all the cases. 3 *Burn* 393.

MACDONALD, Chief Baron.—The plaintiff having made out a clear title to himself as rector, the defendant insists on exemption from payment of hay and agistment-tithe, on the ground of having never paid these tithes; from non-payment he wishes the Court to presume a grant or conveyance of these tithes from the lay impropriator. It is clear that, against an ecclesiastical rector, this defence could never be set up in any shape: whether a lay impropriator should have the same benefit was at first doubted, but that point seems now at rest. Three successive decisions upon it have fully established that there is no difference between a lay and an ecclesiastical rector. *Benson v. Olive*, in 1730, *Charlton v. Charlton* (a) in 1732, and the Corporation of *Bury v. Evans*, in 1739.

As to the other point, also, it seems clearly established, by the case cited from 1 Lord *Raym.* 137., and in *Salkeld*, that a *modus in non decimando* can only be claimed by some well-known division of the country. The present claim is extended to certain parishes enumerated in the answer, and which have not any common denomination, nor any mark by which they can be considered as a distinct and

(a) *Bunb.* 325.

separate district. The claim of a modus being therefore bad, in respect of the territory to be covered by it, it becomes necessary to consider the other question, as to what species of tithes such a modus may apply.

The Court decreed an account.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER;
IN
EASTER TERM,
36 GEORGE III.

TARLETON v. STANIFORTH, in Error.

In the Exchequer Chamber.
W. Tue. day,
20th April.

(See this case at length 5 Term Rep. 695.)

CHAMBRE, for the plaintiffs in error, in addition to the arguments used below, contended that the general intent of the parties clearly was to give fifteen days for renewal. after the expiration of the period insured; that during these fifteen days both parties have a right of dissent; but if no disagreement is expressed, the payment within the fifteen days relates back so as to cover that part of the time already elapsed. If a con-

trary obstruction is adopted, the mentioning fifteen days at all is only an artifice to deceive the insured into an opinion of their being safe, when in truth they are not. If it is a new agreement, without any other connexion with the former except that of being on similar terms, the parties may come to such an agreement at any time. The fifteen days given must mean some benefit which they cannot have afterwards; which they "forfeit," if the premium is not then paid.

BULLER, J. The clause is meant for the purpose of making it a continuance of the old agreement, so as to avoid the expence of new stamps.

Chambre. If the insuring office receives, on the 15th day after the expiration of the former year, the premium for a year's insurance, to commence from the expiration of the former year, they receive a whole year's insurance for a period less than a year by those fifteen days; for the insured has already stood the hazard during that time: this supposes a constant imposition on the one side and mistake on the other. In all mercantile transactions, the meaning of the parties is explained by the course of the trade.

Wood on the other side.

The Court were clearly of opinion that the judgment ought to be affirmed.

MUTLOE v. SMITH.

Friday,
22d April.

THE bill stated that *A. B.* died above twenty years ago, seized in fee of a messuage, leaving the plaintiff his heir at law. The widow continued in possession of the premises till her death in 1789, and her daughter the defendant has continued in possession ever since. The bill suggested that the defendant claimed under some deed or devise from the ancestor of the plaintiff, and prayed a discovery of her title.

The defendant demurred.

Romilly for the demurrer insisted, that a Court of Equity never compels a tenant in possession to make a discovery, unless to remove any obstacles out of the plaintiff's way in proving his own title, as if the defendant has his deeds, &c. *Buden v. Dore*, 2 Vez. 445. *Ivy v. Kekewick*, 2 Vez. jun. 679. and a similar case of *Davies v. Henley*, 1st November 1793. After so long possession and a descent cast, the origin of the defendant's title is not to be inquired into.

Partridge and *Lewis*, for the plaintiff, insisted that there was that privity between the parties, which entitled them to a discovery. The bill states that the defendant claims by a devise, or otherwise, under our ancestor; we have a right to know how we are disinherited. The length of time cannot be set up, because the widow had a

right to her dower in the house, and her possession cannot be considered as adverse.

The demurrer was allowed.

*Tuesday,
26th April.*

PARRY v. DAWSON.

A contract for goods was put an end to by both parties, but the goods were in the possession of the intended purchaser. The value rising, he converted them to his own use, and offered the former price. The owner demanded the increased price; and on nonpayment held defendant to bail, "for goods sold and delivered." This does not prevent him from suing in trover.

THIS was an action of trover for a quantity of spirits.

The defendant, a merchant at *Liverpool*, wrote to the plaintiff, a distiller at *Bristol*, to order a large assortment of spirits, to be shipped at several times. Soon afterwards, on 18th *May* 1795, he wrote again to countermand the order, adding that he would take spirits of him, as he should have occasion, in the usual course, from the warehouse kept at *Liverpool* for the *Bristol* distillers. On the 22d of *May* the plaintiff wrote in answer, that the first cargo of spirits was already shipped: that, as it would be difficult to get the customhouse permit altered, he should let it proceed on the voyage consigned to the defendant, who might then easily get it removed into the general warehouse; and that the other spirits should not be sent.—The spirits arrived at *Liverpool*, and were lodged in the king's warehouse in the name and under the directions of the defendant, and never removed by him into the general warehouse. The price of spirits was then 2s. 4d. per gallon. On the 25th *June* the price rose to 4s. 6d. in consequence of the act of parliament

stopping the distilleries. The defendant soon afterwards took the spirits out of the king's warehouse and sent them abroad for sale, and on the 10th *August* wrote to the plaintiff that he had done so, and charged himself with the price at 2s. 4d. The plaintiff on the 12th wrote back that he considered the contract as having been abandoned, but offered to let him have the spirits at the price they then bore, 4s. 6d. and threatened to arrest him for the value in default of payment. The money not being paid, the plaintiff arrested the defendant for 1600*l.* (the value of the goods at 4s. 6d.) on affidavit of a debt *for goods sold and delivered*. He did not, however, proceed in the action of *assumpsit*, but brought this action of trover. The action was tried before the Lord Chief Baron, who left it to the Jury to say whether the contract was rescinded: they thought it was, and accordingly found a verdict for the plaintiff.

Law and Giles obtained a rule to shew cause why a new trial should not be granted. They contended that the plaintiff had concluded himself from suing as for a tort. Supposing the first contract to have been rescinded, yet the defendant took under colour of a purchase from the plaintiff, and it was not open to him, upon an action for goods sold and delivered, to have denied the existence of the contract. The plaintiff refused to sell at the price offered; he demanded more, and threatened to arrest in case of non-payment of the larger price, treating it as a sale of the goods for a price to be fixed by their value in the market at the time. He proceeds on the same idea to make an affidavit of

the debt *for goods sold and delivered*. This circumstance was held to conclude the vendor in *Smith v. Field*, 5 Term R. 405.; and the Court would not permit him afterwards to disaffirm the contract. If a landlord brings an action for use and occupation, he admits the holding, and cannot afterwards bring an ejectment as for a tortious possession. *Birch v. Wright*, 1 Term R. 387. Here both parties have agreed to consider it as a sale, and the circumstance of the price being disputed, does not alter the nature of the transaction. The Court ought to lean in favour of this construction, because by suing in trover the plaintiff avoids having a set-off against him. They also argued that trover would not lie without a tender of the money due to the defendant for warehouse-room, he having a lien for that sum.

Plumer and *Dauncey* shewed cause.

Monday,
9th May.

MACDONALD, Chief Baron.—It is perfectly clear that the first contract between the parties was annulled. The spirits were in the possession of the defendant, not upon a sale to him, but merely as an agent to deliver them into the proper warehouse; he chose afterwards to make use of these goods, and attempted to set up the contract which had been rescinded at his own request. The plaintiff on hearing of it unequivocally refuses to consider the former contract as subsisting; he offers, however, to accept the then market price for the goods, if the defendant will pay it immediately. This is refused; then there is no contract between the parties. But it is said that the affidavit to

hold to bail shall conclude the plaintiff, and the case of *Smith v. Field* is relied on. In that case a contract had subsisted, the vendee offered to rescind it, the vendor would not agree to do so, and made the affidavit of debt on the ground of the sale: as evidence of a refusal to rescind the contract, this conduct was unequivocal and conclusive; but in the present case there was no contract; the parties did not agree to each other's terms, and the arrest took place in pursuance of a threat accompanying the refusal to accept the smaller price. The affidavit is of a debt to the value of the goods at the larger price; this never can be evidence of an agreement to renew the old contract at the smaller price, and the offer to accept the other was never acceded to by the defendant. The affidavit cannot have any effect to bind the plaintiff, otherwise than as evidence of his assent to the contract as subsisting; for even if he had proceeded to trial on the *assumpsit*, and been nonsuited, he might afterwards have changed the shape of his action.

The claim of lien might have raised some question, if the conversion had only been constructive, by a refusal to deliver over the goods; but here the conversion is actual, and cannot be covered by the claim of lien.

The rule was discharged.

*Friday,
6th May.*

THE ATTORNEY GENERAL v. HENDERSON.

The Attorney General may at any time amend a revenue information.

THE *Solicitor General* moved for leave to amend the information, by adding another count, on payment of costs.

Plumer, contra, insisted that this could not be granted. If the information is amended, it must be upon the ground that the Attorney General might of course file a new information, and attain the same end at increased expence and delay. But, in truth, the information must be of the same date with the seizure, and must, by the rules of the court, be filed within a month after it. When that period is elapsed, the leave of the court must be obtained to antedate the information, and must be upon shewing some grounds for obtaining it; the present being made as a motion of course, cannot be granted.

Upon inquiry the practice was found to be, that the Attorney General may, at any time, amend an information as of course. The Court therefore granted the motion.

ROBERTS v. CLAYTON.

*Monday,
9th May.*

THIS was a bill to redeem a mortgage; it stated the conveyance informally, not shewing that any legal estate had passed. The transaction was stated as a mortgage, and that the defendant had entered by virtue of the conveyance, and still continued to enjoy under it.

On a bill to redeem, the mortgagee cannot object that the bill does not state a valid legal conveyance to him.

A demurrer to the relief is over-ruled by an answer to the discovery of the facts on which the relief is prayed.

The defendant demurred to the whole relief sought, and put in an answer denying the mortgage, and claiming the estate under another title.

Owen, in support of the demurrer. The defendant not appearing by the bill to have any legal estate in the land, it is still in the plaintiff; his remedy is therefore at law.

Williams, for the plaintiff. The mortgagee in possession cannot object that his title is bad, if we agree to treat it as a valid conveyance to him; besides, if we should proceed at law, the defendant would bring us here to complete his title, and the objection is, that we put the parties now in the same situation as they would be after these two suits.

The defendant has also over-ruled his demurrer by the answer; the demurrer to relief admits the facts upon which it is prayed; it admits, therefore, the mortgage: the answer denies the mortgage.

Owen, in reply. If the plaintiff were to pay or tender the money due on the mortgage, and then proceed at law, the defendant would have no equity to have his title completed, nor would it be at all necessary to come here.

As to the point of form, he insisted that the defendant may demur to the relief sought, and answer as to the discovery prayed. *North v. Earl of Strafford*, 3 P. Wms. 148. *Abraham v. Dodgson*, 2 Atk. 157. *Gilb. For. Rom.* 53.

MACDONALD, Chief Baron.—Both points are perfectly clear. It is not open to the defendant to object to his own title, which is admitted by the plaintiff to be good; but even if it were only an equitable mortgage, as an agreement or pledge of title-deeds, the mortgagor ought to come into equity to redeem, and not proceed on his legal right. The whole transaction is properly the subject of equitable cognizance; one material part of it is the taking the account, and therefore a tender of what the mortgagor supposes to be due, does not oust the whole jurisdiction of equity, so as to leave the party to his legal remedy.

Upon the other point also, there can be no doubt that the answer over-rules the demurrer.

The demurrer was over-ruled.

HARRIS v. DAUBENY.

Same day.

ROMILLY moved to amend the answer by striking out a passage in it. *Richards* admitted the amendment to be *bona fide*, but objected that it ought to be done by a supplemental answer, as the Court never allow an answer to be amended, from the danger of perjury.

The defendant had leave to file a supplemental answer.

SITTINGS AFTER EASTER TERM.
SERJEANT'S INN HALL.

The KING v. BARBER.

*Thursday,
12th May.*

Two extents went for 1241*l.* 19*s.* the one to the Sheriff of *Durham*, the other to the Sheriff of *Newcastle*. The former seized goods to the value of 604*l.* 17*s.*; the latter to 260*l.* The defendant paid the debt to the latter, before any *venditioni exponas* issued on either.

Two extents issued into different counties for the same debt; both sheriffs seized goods; the debt was paid to the one before *avenditioni exponas* issued to either. He shall have the whole poundage.

Bailey obtained a rule to shew cause why the poundage should not be apportioned.

Plumer, for the Sheriff of *Newcastle*, contended that his client was entitled to full poundage, and rested on the case of the *King v. Caldwell* (*ante*, vol. 1. p. 279.)

Bailey, for the Sheriff of *Durham*, argued that the poundage ought to be apportioned, as in the case of the *King v. Fry* (*a*). The distinction is, that

(*a*) That case is erroneously stated, (*ante*, vol. 2. p. 358,) the reporter having been misled by a false entry in the minute-book of the court of the 28th Nov. 1793. It ought to stand thus :

But where the debt is paid to the officers of the Crown immediately, although upon compulsion of the one levy, the poundage shall be apportioned between the Sheriffs.

The *King v. Fry*, 28th Nov. 1793.—Two extents issued for the same debt to the Crown of 11,574*l*. The Sheriff of *S.* seized goods to the amount, and in order to liberate the goods so taken, (which were partnership stock,) the partners of the defendant paid the debt to the Receivers General of the Excise. The Sheriff of *B.* also claimed to have seized to the full amount. Upon the money being paid, neither levy was proceeded in.

The Attorney General argued that the Sheriff is entitled to claim poundage *de jure*, only where the *levy* is completed. 3 G. 1. c. 15. s. 3.

Rouse, for the Sheriff of *S.*, argued that he was equally entitled to poundage from the money being paid by compulsion of his levy, as if he had raised it upon a *venditioni exponas*; *Salk.* 332. *Parker* 177. *Lane* 74. and if he is entitled to poundage at all, as having levied, he must have the whole; the *King v. Caldwell* (*ante*, vol. 1. p. 279.)

Lens, for the sheriff of *B.*, argued that the money not having been paid into the hands of either Sheriff, the Court could not

where the money is raised by the levy of one Sheriff, he shall have all the poundage; but where the money is paid before the levy is completed, although by compulsion of the levy, it shall be apportioned.

By the *Court*. In the case of the *King v. Fry*, the money was paid into the hands of the Receiver General, and not to either Sheriff. The Court therefore thought that it would be too nice a distinction to enquire which levy had compelled the payment of the money, and accordingly the poundage was apportioned. The present case falls exactly within the rule of the *King v. Caldwell*, from which it cannot be distinguished.

The rule was discharged.

take notice of its being by compulsion of the one seizure, more than the other, and therefore the poundage ought to be apportioned.

The Court declared that a levy having actually been made to the amount of the debt, poundage was due; and they referred it to the Deputy Remembrancer to apportion the poundage according to the respective claims of the Sheriffs.

Afterwards, on 27th February 1794, the Deputy Remembrancer reported the seizure of the Sheriff of *S.* as above, and that the money was paid by compulsion of that seizure. Of the seizure of the Sheriff of *B.* the greater part was disallowed, as being subject to mortgages and other prior liens, so that he was reported to have seized only to the amount of 859*l.* The Court directed the poundage to be divided in the proportion which that sum bears to the whole debt.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER;
IN
TRINITY TERM,
36 GEORGE III.

*Tuesday,
7th June.*

The ATTORNEY GENERAL v. BROWN.

If a cutter obtains a licence from the Admiralty as "intended to proceed on a voyage to *Lisbon*," and sails upon a different voyage, she is liable to forfeiture, and may be seized although then lying in her original port.

ON an information for forfeiture of the defendant's cutter, it appeared that she was such a vessel as required a licence within 24 *Geo. 3. sess. 2. c. 47.* 27 *Geo. 3. c. 32.* and 34 *Geo. 3. c. 50.* She had accordingly obtained a licence which described her as "at and belonging to *Colchester*, and intended to "proceed on a voyage to *Lisbon*." After having obtained this licence she did not go to *Lisbon* but to *Flushing*. After her return she went a voyage to *Sunderland* for coals; she was seized at *Colchester* after the last voyage. The Chief Baron directed the

Jury that, if they thought the intermediate voyages to *Flushing* and *Sunderland* could be considered as preparatory to the voyage to *Lisbon* to take in goods for that voyage, or otherwise, so that it was not a substitution of a different destination from that specified in the licence, they ought to find for the defendant. The Jury found a verdict for the Crown.

A rule having been obtained calling on the Attorney General to shew cause why a new trial should not be granted, cause was now shewn by

Mr. *Solicitor General* and *Newnham*. They argued that the vessel is forfeited by the acts, unless she has such a licence as is required by the Legislature, a licence specifying the voyage upon which she is about to sail. While she continues to answer that description the licence protects her. When she ceases to answer the description in the licence, she no longer has such a licence as the acts require, and is therefore liable to forfeiture.

Rouse and *Dauncey*, in support of the rule. By the 24 Geo. 3. the Admiralty were bound to specify on the licence the particular port for which the vessel was intended to sail. By 27 Geo. 3. c. 32. s. 10. it is left discretionary in the Admiralty, either to grant a licence limiting the destination of the vessel, or a general licence. This is a general licence, and the addition of her being "intended to proceed on a voyage to *Lisbon*," is merely a description of her then destination, not limiting it expressly to that or any other voyage. The licence must also

describe the number of men and guns, and the tonnage, &c. ; perhaps she may increase or diminish the number of her guns or men before sailing or afterwards, or her tonnage may be inaccurately taken; Will she therefore be forfeited? These things are all necessary to be inserted in the licence; if the latter are merely descriptive, and will not occasion a forfeiture by being changed, or inaccurate, the destination must be considered in the same light.

By 27 Geo. 3. c. 32. s. 5. it is provided, that vessels found out of the limits specified in a licence, "limiting or confining their navigation," shall be forfeited. Then, before that act, the exceeding the limits was not a forfeiture of the vessel, even where the licence was limited, *a fortiori* where it was unlimited; and licences of the latter description are not affected by this act. The Legislature were satisfied with the bond given on obtaining the licence.

But supposing this in the same situation as a limited licence, the seizure is improper. It is directed to be made "if found in any port or place other than that to which," &c. ; here she was seized at *Calchester*, the port from which she was to sail for *Lisbon*; she was not therefore "found in any other port or place," and it cannot be maintained that the forfeiture attached on her going to *Flushing*, and could be taken advantage of at any time afterwards. If it did, then she might be seized at *Flushing*, or on her voyage home, whether within distance or not; but it is provided by s. 7. that such vessel shall not be questioned unless within four leagues of the coast.

The *Solicitor General*, in reply. The Admiralty have no authority to grant an unlimited licence. They must either grant a licence for a particular voyage, or for navigating within certain limits; in both, the navigation is limited: and the clause in 27 Geo. 3. applies to both. But without resting on that clause, the general purview of all these acts considers the destination as a necessary part of the licence. If the destination may immediately be changed, the policy of the acts will be defeated. It would go this length, that, by a licence for a voyage to *Lisbon*, all future voyages to any foreign or *British* ports would be protected. If this could not be the intent of the Legislature, then the destination mentioned in the licence must be a limitation, not a description merely: or if it is a description, it is the description of an essential requisite without which the ship ceases to answer the description in the licence, or to be protected by it. So if the number of guns or men were materially changed, she would require a fresh licence; if the tonnage was grossly misrepresented so as to go beyond the probability of a mere mistake, it would be a ground of forfeiture; the vessel would not then have such a licence as is required by the statutes.

37 Geo. 3. c. 32. s. 5. provides that a cutter found out of her limits shall be forfeited, in the same manner as if she had no licence: that is, upon being found within four leagues of the coast. She could not therefore be seized out of that distance, but whenever she returns within it, the forfeiture is incurred.

MACDONALD, Chief Baron, this day delivered the opinion of the Court.--This case depends upon the construction to be put upon two acts of parliament, the 24th and 27th *Geo. 3.* the former of these in s. 7. requires the licence to set forth "for what port the vessel is about to sail," which seems to confine the licence to a particular voyage between two specific ports. This was found inconvenient in some cases, and the Legislature in the 2d act has impliedly given authority to the commissioners of the Admiralty, to issue licences for a general course of trading within any particular limits to which they may think proper to extend it: and it provides, that if the vessel shall be found out of those limits, she shall be forfeited as if she had no licence. I find, upon inquiry at the Admiralty, that licences are now considered there and always granted with the view of continuing so long as the vessel shall remain in the same course of trade specified in the licence. Thus, if a licence is granted to navigate from *London* to *Hull*, the vessel is protected in her return; for a voyage to *Hull* implies in truth the voyage there and back; and if she makes another voyage to the same place, it is not the practice to require a fresh licence. If she changes her voyage, a new licence is required. It is plain, upon looking into the two statutes, that this is the meaning of the Legislature. It is made necessary to set forth the description of the vessel, and the specific voyage or limits of her trade, for the purpose of enabling the Admiralty to judge, whether it will be safe to the revenue that a vessel of such a description should be allowed to trade upon that coast. If granting a licence for one voyage is a general pro-

tection, this security to the revenue is lost, and the Admiralty have no discretion upon the subject. It appears clearly, therefore, that the voyage upon which she is about to sail, is a material part of the licence, and if there is a change in that particular, she has no longer a licence which sets forth for what port she is about to sail, and is therefore liable to forfeiture.

The rule was discharged.

The ATTORNEY GENERAL v. ROOTE.

Same day.

THIS information was for a similar cause of forfeiture to that in the last case. The vessel in question obtained a licence on 11th September 1784, as being "intended to be employed in the oyster fishery, from the *Spurn Point* to the *Isle of Wight*." In 1795, she went a voyage to *Hamburgh*, and was seized on her return in August 1795, being then within the limits mentioned in the licence. After a verdict for the Crown, a rule to set it aside was obtained and now supported by

If a cutter has a licence as intended to be employed in the oyster fishery between the *Isle of Wight* and the *Sourne Point*, by a voyage to *Hamburgh*, she becomes liable to forfeiture.

Rouse and Dauncey. They argued that the seizure was illegal. Admitting this to be a licence limiting the navigation of the vessel, the only statute by which it can be forfeited is the 27 Geo. 3. c. 32. s. 5, which provides, that if any vessel, hav-

ing a licence limiting her navigation, "shall be
" found in any port or place out of those limits,
" such vessel may be seized," &c. Then the port
or place referred to, in which if a vessel is found
she may be seized, must be some port or place in
which the seizure may take place, that is a *British*
port or place, not a foreign.

The intention of the act is, to prevent such ves-
sels going to any parts of the *British* coast, other
than those specified in the licence.

Mr. *Solicitor General*. The vessel is not liable to
forfeiture at *Hamburgh*, but if she is found there,
that is, if she can be proved to have been there,
she has abandoned the licence and may therefore
be seized on her return as having no licence.

MACDONALD, Chief Baron.—This case is very
clear. The licence specifies certain points of the
coast to which the navigation of the vessel is con-
fined. It protects her while she is within those
limits; as soon as she goes out of those limits, her
licence is gone, and she is as liable to be seized as
if she had none. The act 27 *Geo. 3. c. 30. s. 5.*
expressly provides for the case.

The rule for a new trial was discharged.

MATHEWS & UX. v. BOWMAN.

Monday,
13th June.

WATKINSON HAWARD, by his will, made 27th *December* 1776, gave all his freehold and copyhold estates to trustees on trust for his two daughters, for their lives, "in equal moieties, as tenants in common, for their sole and separate use, independent of their present or any future husbands," and remainder to their children. He then adverted to a mortgage upon one of his estates, and directed that, if the mortgagee insisted on payment, the estate should be sold, and the residue of the money "to be equally divided between his said two daughters, share and share alike, for their own sole use, independent of their said husbands," &c.; his personal estate he left to his executors in trust for his two daughters, "for their own sole use, independent of their husbands, equally to be divided between them, share and share alike, except what is particularly disposed of by this will;" he then gave to one of his daughters a tankard and ring, and a few other legacies to other persons. On 11th *February* 1778, and 3d *April* 1779, he added to his will two codicils. On 11th *December* 1779, he made another codicil, beginning with these words: "I *W. H.* being minded and desirous to make some additions and alterations to my last will and testament, bearing date 27th *December* 1776, and to my codicil, bearing date 11th *February* 1778;" he then gave some additional legacies to the legatee mentioned in that codicil: "And, as an addition or alteration to my

“ said will, I do hereby revoke the specific bequest
 “ to my daughter *Olivia*, as I would be glad to pre-
 “ serve peace between my said daughters ; and in-
 “ stead thereof my will is, that my plate, linen, and
 “ household furniture shall by my executors be
 “ equally divided between my said two daughters ;
 “ my eldest daughter to have the first choice of
 “ the plate and other things ; but in case they can’t
 “ agree about the division thereof, then my will is,
 “ that they shall be all sold, and the money arising
 “ therefrom to be equally divided between my two
 “ daughters : and after payment of my just debts,
 “ legacies and funeral expences, the residue of my
 “ personal estate, together with the money arising
 “ from the sale of the *F.* estate, after payment
 “ of the mortgage thereon, I give and bequeath to
 “ my said daughters for their own sole use, not to
 “ be subject of the debts or controul of their hus-
 “ bands, and that the same shall be paid into their
 “ own proper hands, and their receipts alone shall
 “ be a sufficient discharge to my executors for the
 “ same.”

The testator died in 1780 ; the executors re-
 nounced, and the two sisters took out administration.
 Afterwards, one of the sisters died, and her husband
 the defendant, as administrator to her, possessed
 himself of her share of the testator’s property. The
 plaintiffs, the other sister and her husband, insisted
 that the residuary bequest, by the last codicil, was
 given to the two sisters, as jointenants, and that,
 therefore, the whole survived to the plaintiff. This
 bill was accordingly brought for an account of the
 property come to the hands of the defendant.

Graham and Hall, for the plaintiff. It seems clear that the words of the codicil, taken by themselves, would carry a jointenancy of the residuary bequest. It is given to the two daughters of the testator, and no words of severance are used so as to raise a tenancy in common; the subsequent words are merely to defeat the claims of their husbands, not to alter the mode of taking as between the two sisters. If the grant were to one of them for her separate use, the same words must be made use of to vest it in her independent of her husband. The circumstance of both being married, and each requiring that provision in the bequest as against her husband, cannot affect the nature of their rights as between themselves. In the former will, the bequest had been made to them as tenants in common, and in several parts of the will, where any devise or bequest to them is mentioned, the testator uses the most accurately technical expressions to convey a tenancy in common. So in the codicil the furniture and plate, or the money arising from the sale thereof, is to be *divided*, the testator preserving as to this the same directions in the mode of their enjoyment as in the former will, *viz.* as tenants in common: As to the other parts of his personal estate, he alters the bequest to a jointenancy; and it is clear that, whether this be considered as a subsequent part of the same will, or as a new will, it revokes the former expressions, so far as it differs from them. *Co. Lit.* 114. 2 *Mod.* 158. 2 *Bl. Com.* 502. 1 *Vern.* 23. Indeed, where it is by a subsequent codicil, the intent to alter is more strongly implied than in a difference of expressions in the same will. Thus if two legacies of the same amount to the same person are given in

" said will, I do hereby revoke. . . a repetition of
 " to my daughter *Olimia*, . . . it is construed
 " serve peace between n . . . *ison*, 1 *Bro. R.*
 " stead thereof my will is
 " household furniture
 " equally divided bet . . . to alter his residuary
 " my eldest daug . . . for its being repeated.
 " the plate and of
 " agree about t . . . the defendant. The codi-
 " that they sh . . . for the purpose of making one
 " therefrom : . . . " And as an alteration or
 " daughters . . . said will, I hereby revoke," &c.
 " legacies . . . the codicil is satisfied by that al-
 " person . . . must be considered as confirming all
 " ing . . . the will, if the words of the codicil
 " c . . . ed with such intention. The bequest
 " . . . sers may be joint or several; the law
 " . . . is joint, if there is nothing to shew the
 " . . . but this bequest may be consistent with
 " . . . will, and therefore shall be construed by
 " . . . testator had meant to alter the mode of
 " . . . he would have done so by express words,
 " . . . to a doubtful inference from ambiguous
 " . . . : besides, the direction that the money
 " . . . be paid into their proper hands, implies a sever-
 " . . . It is not merely that the interest is to be so
 " . . . or that the executors are to be trustees for both;
 " . . . principal is to be paid, one moiety into the hands
 " . . . each, which cannot be without a severance.

MACDONALD, Chief Baron.—We are to collect
 the intent of the testator from the whole will taken
 together, and not merely from the particular codicil
 in which the residuary bequest is last mentioned. By
 referring to the will, it appears the testator had a ge-

divide the whole of his estate, real and personal, between his two daughters, independently of his mother. This intention, as to the bequest of real estate, is not impeached by any subsequent declaration of severance in the interests to be taken of the personalty, is also clearly marked out in the will. Let us see then what is the general intention of the codicil. It is expressly made for the purpose of removing a trifling inequality in the division of the plate; with that alteration it confirms the bequest of plate and furniture in the will, cautiously directing that it shall be divided in a certain manner. No reason can be hinted at why this should not have been given in the same manner as the other personal estate; and as the whole is given to the same persons as in the will, the words "to be divided" may fairly be carried on from the first part of the bequest of personalty to the residuary clause; and this seems the more natural construction from the direction to pay the residue "into the hands" of the legatees, which implies a severance. The other Barons being of the same opinion.

The bill was dismissed.

SPEED V. PHILIPS.

There was a bill to set aside annuities on payment of the principal money advanced. The plaintiff, aged about 30, applied for money to one *King*, who introduced him to the defendant. The defendant agreed to lend him 1200*l.* on getting two annuities of 100*l.* each a-year, for the life of the borrower, secured by the bond and judgment of himself and Lord *Sandwich*. The plaintiff being afterwards again in distress for money, he applied a second time to the defendant for 89*5*l.** on the same conditions; he told him he had 2450*l.* by him which he did not choose to divide, but that Lord *Falkland* and *Delves Broughton* also wanted part of it, and proposed that the plaintiff should join with them in borrowing the whole sum, and becoming bound for each other for payment of the annuities to be given to the defendant for it. To this proposal the plaintiff and the other two assented, and the defendant advanced them the said sum, viz. 800*l.* to the plaintiff, and the remainder to Lord *F.* and *D. Broughton*, for which they jointly and severally bound themselves to pay to him several annuities, viz. one of 125*l.* during the lives of Lord *Falkland* and the defendant, or the survivor; another of 125*l.* for the lives of the defendant's wife and daughter, and the life of the survivor; and the third of 100*l.* during the lives of the defendant and his wife, and the life of the survivor.

To this bill the defendant demurred.

Richards insisted that the plaintiff had shewn no equity. There is no fraud or imposition suggested; the second transaction, as well as the first, was at the solicitation of the plaintiff. The defendant refused to divide his money; he refused to lend a portion of it to any of the three borrowers, but lent to all jointly; neither of the three has a right to complain of this, as they have mutual benefit and mutual risk; then the only question is, Whether the inadequacy of consideration for either or both the annuities shall be held sufficient to set them aside? The rule seems now settled, that that circumstance alone shall not have the effect. In *Heathcote v. Paignon*, 2 Bro. R. 175. the Lord Chancellor considered that circumstance as not alone sufficient to set aside the security, although, upon the whole circumstances, the extreme distress of the borrower, &c. he did there set it aside. In *Griffith v. Spratley*, in the Exchequer, 21st June 1787 (a) it was expressly so ruled; and in *Barnard v. Flint*, in the Exchequer, Hil. Term, 33 G. 3. the same doctrine was held by the Court (b).

(a) See this case, 2 Bro. R. 179. (n)

(b) That was a bill to redeem an annuity secured on land. The plaintiffs rested on inadequacy of the price, and also on the situation of the plaintiffs at the time of the transaction, having been in the greatest distress, in prison, and in want of common necessities. The Court directed the Deputy Remembrancer to report what was the market price of the annuity at the time, but expressly protested against this being understood as a declaration of their opinion, that inadequacy of price would alone be held a sufficient ground to set aside the annuity. On the report it appeared, that the price given was very nearly the market

Tuesday,
14th June.

Mere inadequacy of value is not a sufficient ground to set aside an annuity.

argued that the common law security for Lord F. and his family was an unfair advantage of his position to look it out of the common law security of price.

Chief Baron, this day delivered his judgment in the Court.—Upon looking into this case, finding that amounts to a charge of annuity, and amounts only to a case of inadequacy of price, which has been determined not to be sufficient to set aside such a transaction.

The demurrer was allowed.

at the time, and the bill was dismissed. In the course of the argument, the distinction taken in *Heathcote v. Paignon*, between the *value* of an annuity and the *market price* of it, was a good deal considered, and the Court thought that the market price was the only criterion of value into which they ought to look.

GARTSIDE v. GARTSIDE.

AN annuity was granted by *A. B.* payable out of certain estates, part of which came afterwards to the plaintiff, part to the defendant. Disputes arising about the proportions in which the annuity was to be paid, a bill was filed in this court, but the parties afterwards submitted to have the matter referred by an order of the Court to arbitration, and thereupon an award was made. The bill charged that the defendant, in giving in to the arbitrator the particulars of the estate in his hands, (as the annuity was to be apportioned according to the value of the part of the estate in the hands of each,) wilfully misrepresented its extent and value, suppressing several parcels; that the plaintiff had not till lately discovered the fraud. The bill prayed to have the matter opened.

A submission to arbitration was made a rule of this court, and an award made. The bill stated the award to have been obtained by misrepresentation of facts not then known to the plaintiff. Plea, the award alone, and no answer. The plea is bad.

The defendant pleaded the award alone, and did not put in any answer.

Plumer and *Pemberton*, in support of the plea, argued, that the award was a bar to any further investigation of the subject. The award alone is therefore a good plea. *Tittenson v. Peat*, 3 *Atk.* 529. *Pusey v. Desbouverie*, 3 *P. Wms.* 317. *Pope v. Bish*, (*ante*, vol. 1. p. 59.) and *Edmundson v. Hartley* (*ante*, vol. 1. p. 97.) Here the plaintiff has shewn no case against the award, he has not stated when or how he came to find out the de-

reason why he might not
before the award. It was
inquiries; the presumption
that was known to the arbi-
trary neglects to bring forward
for himself, he is not therefore
subject or award against him: he
that he used due diligence before
etc.

to the award continues a subsisting order
of Court, it is final against both, and the bill
cannot seek to set aside or destroy the effect of
the award, which would therefore continue to bind
the plaintiff although this bill should be allowed.

Partridge, Richards, and Lewis, for the plaintiff.
It is a mere confusion in terms to suppose that an
award is a bar to any inquiry concerning the mode
in which the award itself was obtained. It only
bars inquiry into all the matters submitted to the
arbitrator, while the award remains good; but even
if all is fairly submitted to him, yet gross and appa-
rent errors in the award may be set right by a
Court of Equity. *Tittenson v. Peat*, 3 Atk. 529. and
Anon. 3 Atk. 644. Accordingly, wherever an award
is pleaded, all circumstances impeaching the award
itself must be denied in the answer. *Alardes v. Camp-
bell*, Bunb. 266. and in *Pope v. Bish*, and *Edmundson
v. Hartley*, the only question was, whether such
denial ought to be only contained in the answer, or
in the plea also; but if not supported by the answer,
it is bad, *Freeland v. Johnson* (*vi. ante*, vol. 2. p.
407.) The charges of misconduct here are such as

equity always relieves against. It was the duty of the defendant to discover truly the parcels of the estate in his possession, and the title deeds not being in the power of the plaintiff, he is not guilty of negligence in trusting to the representation given by the defendant.

MACDONALD, Chief Baron.—The bill admits the award to have been fair in every other respect; but charges that, by a wilful concealment on the part of the defendant, the arbitrator had not a possibility of making a just award upon the whole matter. The suggestion is, that according to the principle of decision actually adopted by the arbitrator, he must have drawn a different conclusion if he had not been deceived. It seems necessary that that fact should be investigated.

HOTHAM, Baron.—I do not see how this matter can be said to be concluded by the award. The bill charges that those material parts were prevented from ever coming before the arbitrator; then they were not the subject of the award.

PERRYNN, Baron.—However the fact may ultimately turn out, it appears upon this bill that the defendant has obtained an award unfairly. The award cannot preclude the investigation of that fact; it is exactly *exceptio ejusdem rei cujus petitur dissolutio*.

THOMSON, Baron.—The plaintiff charges a material part which was not known to him till after the award. Whether this alone would have been sufficient, to let in further inquiry may well be

ception, nor given any reason for a wilful concealment. It is said that the defendant has him from his duty to make the disclosure, and that the plea is that he did, and that the plea is denied. The defendant is a party to the material evidence, and the plea was over-ruled. The defendant is to set aside a plea, and must shew that the plea is without effect.

While the case of *London and Others v. Corporation of Liverpool* is pending, the Court does not decide upon the plea of *non est*. The Court has decided that the plea is not good.

The Court has decided that the Corporation of *London* has a privilege, "that the free citizens of the said city, and all their goods, shall be quit and free from all toll, passage, and other customs throughout the kingdom of *England*, and the sea lord the King (except only his due and custom of prizes of wines)."

The Court has decided that the privilege having been infringed by the Corporation of *Liverpool* in the reign of *William* and *Mary*, certain citizens of *London*, cheesemongers, have brought in this Court against the Corporation of *Liverpool*, for an account of cheese stopped by the Corporation for toll; the Court directed an issue to be taken, whether any toll was payable to the Corporation of *Liverpool*, by citizens of *London* trading in cheese, for cheeses laden or unladen within the port of *Liverpool*." This issue was found for the

; a second trial was granted before the Court would proceed to bind the rights of the Corporation; it was again found for the plaintiffs. The Court thereupon directed the Corporation to account for the cheese seized, and granted a perpetual injunction to prevent them and their successors from demanding the said duty from the plaintiffs, or any other the freemen and citizens of *London* for the future dealing in cheese, &c.

The bill then stated that although the immediate question in that cause related only to cheese, yet in truth the general privilege or immunity was thereby fully ascertained against the Corporation of *Liverpool*, in respect of all goods; and that the whole of the evidence given was applicable to the general right, and not confined to cheese.

That the defendants had commenced several actions at law against the co-plaintiffs, who were all freemen and citizens of *London*, for tolls in respect of their merchandizes, laden or unladen at *Liverpool*; and threatened to commence actions for toll against all other citizens and freemen of *London* who should import goods there.

The bill therefore prayed that the plaintiffs might have the benefit of the former decree, that the privilege of exemption from toll on all goods might be declared, and a perpetual injunction granted.

The defendants, as to so much of the bill as was at the suit of the Corporation of *London*, demurred, upon the ground that the immunity being claimed

only in respect of the individual citizens, and not for the Corporation, the latter had no interest in the suit.

As to so much of the bill as was at the suit of the individual freemen, the defendants pleaded that at the time the plaintiffs were respectively admitted freemen of *London*, they were not, nor at any time after were householders, or inhabitants, or residents, or in scot and lot within the said city of *London*; and that those plaintiffs were made and still continued freemen of *London* by fraud, for the purpose of enjoying the benefit of the exemption claimed, and to evade payment of tolls throughout *England*, and particularly of those payable to the defendants.

This demurrer and plea were set down for argument about two years ago; the Court having deferred hearing it until the decision of the cause, then depending in the House of Lords, between the Corporations of *London* and *Lynn*, by which it was expected that the claim of general exemption from tolls would have been settled. That cause however was at last decided upon a collateral point, viz. upon the form of the action on the writ *de essendo quietum de Theolonio*, and upon the right of the Corporation to sue for the establishment of this privilege on behalf of their individual citizens; judgment was given for the city of *London*, the plaintiffs in error.

The case was argued this day by *Burton*, Serj. *Heywood*, *Hargrave*, and *Hollist*, for the defendants;

and by Serjt. *Adair, Newnham, Plumer, Gibbs*, the Recorder, *Heywood* and *Cox*, for the plaintiffs.

The counsel for the defendants admitted that, after the decision in the House of Lords, they could not support the demurrer, the right of the Corporation to support a suit for the privileges of its individual members being thereby established. But they contended that by that decision it was also clear that the plaintiffs had a remedy at law to establish the privilege, and therefore a suit in equity was improper; and that this might be taken advantage of by a demurrer *ore tenus*.

As to the plea, they argued that non-resident freemen were not citizens within the exemption. (a)

They also argued that the charge in the plea of a fraudulent admission was a complete defence; a colourable admission to such a franchise, for a collateral purpose is void. *Hale de Portibus Maris* 126. The City of *Oxford's* case, 2 *Vent.* 106.

On the part of the plaintiffs it was objected that the plea was double and therefore bad. *Whitbread v. Brockhurst*, 1 *Bro. R.* 404. The averment of the plaintiffs not being resident, nor housekeepers, is one defence; the averment of their being admitted freemen by fraud is another independent defence;

(a) The argument for the defendants on the merits is not here inserted, because the question was not entered into by the other side, nor by the Court; and because the claim of the city of *London* is likely soon to be determined in another cause now depending in this Court.

THE DEFENDANT,

... alone sufficient to
... the defendant must
... the former, he would take

...—Even if the plea were good,
... could avail the defendants.
... the suit of the Corporation be-
... they must answer, and the whole
... therefore come on at the hearing.

... defendants it was argued in reply, that
... in the plea went to establish one
... fraud charged consists in this, that per-
... were not resiant in *London*, and who could
... be *bona fide* citizens, were coloura-
... freemen, for the purpose of avoiding
... . Perhaps the non-resiancy would alone
... sufficient bar, or the purpose of admission
... alone be a sufficient ground to set it aside as
... ; but the two parts of the case together
... a stronger case of fraud than either singly. If
... it is thought that either alone would be
... , the other may be rejected as surplusage, or
... Court may and generally does give leave to
... where a fair point is meant to be discussed,
... and a matter of form intervenes.

It may be doubted whether duplicity is a good
objection to a plea. The rule is that two dilatories
shall not be successively pleaded; but where two
dilatories are pleaded together, the rule, which is
established to save time, and prevent vexatious de-



fences, does not apply; much less where two defences to the merits are pleaded at the same time. In *Ashhurst v. Eyre*, 2 *Atk.* 51. 3 *Atk.* 341. the plea was double, yet was allowed.

If the plea to the suit of the individual plaintiffs is allowed, the suit of the Corporation must also be barred. They can only sue to establish their privilege when their citizens are disturbed in the enjoyment of it. If the other plaintiffs are not *bond fide* citizens, the privilege is not disturbed, and upon introducing that fact on the record against the Corporation, by pleading it to their suit also, they must be barred. It is not too late so to plead, notwithstanding the demurrer is over-ruled.

The *Court* over-ruled both the demurrer and the plea.

Ex parte DURRAND.

IN 1771 the testator *Durrand* entered into a contract with Government for supplying the troops in the *West Indies* with provisions at certain prices. He continued for some time to act under that contract, but never literally complying with the directions of it as to the mode of accounting. The Lords of

This Court, as having jurisdiction over all matters relating to the revenue, can controul the conduct of the commissioners for auditing the public accounts.

Where the interposition of this authority is desired, upon merely equitable grounds, and upon complicated facts, the Court will not proceed upon motion or petition, but only upon bill or information.

the Treasury had from time to time had their attention called to the difference and inaccuracy arising from the mode of accounting actually pursued, but never made any order to check it; on the contrary, they directed from time to time money to be paid to him by way of imprest; their warrants expressed it to be for money *due* to him. In 1773 he demanded and obtained an increased allowance on the provisions furnished, and again in 1776. Both of these rises were upon the footing of the former contract; but the contractor still continued to account in the mode before pursued, raising his prices in proportion to the increase of the contract. It appeared that, by the mode of accounting actually adopted, the contractor had greater benefit before each increase of the prices than, according to the mode of accounting prescribed by the contract, he would have been entitled to after such increase.

The commissioners for auditing the public accounts refused to allow the accounts offered, and insisted on their being taken on the foot of the contract, before they would grant a *quietus*.

A rule having been obtained to shew cause why the commissioners should not be directed to make the allowance according to the former mode of accounting; cause was this day shewn by

The *Attorney General*.--He argued that the Court had no authority to make the order. The auditors of the imprest, in whose place the commissioners for auditing accounts are now substituted, were very high officers of the revenue, and there is no instance

of this Court ever interfering to controul them in the exercise of their duty. The statute 25 *Geo. 3. c. 52.* in creating these commissioners for auditing the public accounts, has pointed out (*s. 11.*) the jurisdiction which is to be resorted to in cases of particular hardship, the Lords of the Treasury. Without a special order from them, the commissioners cannot make the allowance here prayed. The motion therefore calls upon them to do a thing contrary to the express directions of the statute. The cases in which the Court of Exchequer may interfere are defined in *s. 23.*

He argued that the conduct of the commissioners was right in taking the account on the foot of the contract.

He also insisted that the present was not a proper shape for bringing forward such a discussion. A bill on the equity side of the court is the only mode by which the truth can be got at. On a motion the Crown has no power to compel witnesses to give testimony.

Mansfield, Piggott, Plumer, Grant, and Rouse, on the other side, contended, that the authority of the Court of Exchequer in matters of revenue was universal, unless ousted, by express provision. The auditors were merely officers of the court. 4 *Inst.* 106.

The public, like an individual, must be bound by the acts of its agents. The Lords of the Treasury had power to make the contract, and to alter

CASES IN THE EXCHEQUER,

t. They might alter it either by express stipulation or by that implied consent which would bind individuals. They agreed to the alteration in the mode of taking the account, when they directed money to be issued *as due* upon the account given in, and acted upon it for many years, as the proper mode of executing the agreement. If they had objected, the petitioner might have refused to renew his contract.

Wednesday,
15th June.

MACDONALD, Chief Baron.—The first question before the Court is the regularity of the proceedings, Whether this Court has jurisdiction over the subject at all, and whether the present is the proper mode of obtaining its aid?

As to the first point, it is clear that the Court of Exchequer has a general jurisdiction over every part of the public revenue; and has complete power to interfere in the taking of the public accounts in every stage of their process.

This authority may be exerted in two shapes; either by motion or petition to the Court, or by the more formal method of an information by the Attorney General, or a bill against him; each of these is the proper mode of application in different cases. Thus, in the ordinary applications to take off an *insuper* improperly imposed, to remove the hands of the sheriff on an improper levy, and the like, a motion is the proper mode of obtaining the assistance of the Court. But where the nature of the question, or intricacy of the circumstances render it impossible to come at the justice of the case on

motion, the more formal mode, by bill or information, must be resorted to.

In this case the petitioner entered into a contract under seal, with the public, fixing the price of the articles to be furnished, and the mode in which the account was to be taken. At law this cannot be departed from; but he now wishes to be allowed, on equitable circumstances, to establish a mode of accounting different from that contained in the covenant. Upon the face of it, therefore, it appears a matter to be inquired into only by a suit on the equity side of the court. The circumstances also are too confused and multifarious to be discussed in a summary application, where the evidence of witnesses cannot be compelled, nor the truth fairly canvassed.

The transaction itself, so far as it now appears before the Court, does not seem to entitle the petitioner to the relief sought. The mode of accounting was a part, a very material part of the contract; for the sum to be actually paid depends upon it. If the contractor did not give in such an account as he was bound to do, the Lords of the Treasury might have refused to advance him any thing. There would have been some hardship in this, as he produced vouchers for large quantities of stores actually delivered. They wished to advance him something by way of imprest, to enable him to proceed in the contract; in the absence of the proper account, they adopted the only evidence they could find of the value of the articles delivered, and directed him to receive an imprest to that amount. It is impos-

sible that this could be considered as binding them finally to admit that account. Every public accountant knows that his account cannot be finally settled till it has been admitted by the auditors; till that period, all the computations made are merely for the purpose of forming a guess how much can safely be advanced to the public creditor. The imprest granted upon that computation is merely upon account, and those in the present case are expressly so granted. The circumstance of the warrant stating the imprest to be for money due to the petitioner, makes no difference. They computed that that sum would be found due, but in fact nothing can be said to be due, till the account is finally taken by the auditors. There is no ground therefore to conclude that the Lords of the Treasury ever meant to abandon the mode of account stipulated, or to adopt another mode for the taking the account finally before the auditors.

His Lordship then went into the other circumstances of the case, from all which he drew the same inference, that neither party ever could have considered the original contract as abandoned.

The rule was discharged.

SITTINGS AFTER TRINITY TERM.

JOHNSON v. GOLDSWAINE and Others.

Thursday,
30th June.

THE plaintiff was landlord of the farms held by the defendants under a lease, by which they were bound to spend on the premises all the hay, straw, and holm arising in the three last years. The supplemental bill charged that the defendants threatened to carry away the straw and dung in the last year, and to plow up an excessive quantity of the land; and prayed an injunction to restrain them from so doing. Upon an affidavit verifying the facts as charged, *Hollist* now moved for an injunction (before answer to the supplemental bill.) He considered the application as a motion to stay waste, and relied on the case of *Geast v. Lord Belfast* (a).

(a) *Geast v. Lord Belfast*, in *Chancery*, 12th February 1796.

In 1792, the plaintiff granted a lease to Lord *Belfast* of a house called *Merevell-Hall* in *Warwickshire*, for seven years, with certain fixtures mentioned in a schedule to the said lease; and in the lease was contained a covenant by Lord *B.* that he would spend upon the premises all the hay and manure arising from them.

Hart for the defendants.

The *Court* thought that this was not a case of irreparable injury, which is the only ground of this summary interposition of Courts of Equity ; the plowing up ancient meadow is, upon the face of it, irreparable waste ; here the question, as to the proper quantity of land to be cropped, is only fit for a jury to decide. The carrying off straw and manure

The defendants *Houlditch's* who were Lord *B.*'s coachmakers, having got from him a bill of sale of all his effects, entered upon the premises, and advertised to be sold by auction, not only all Lord *B.*'s furniture, but the fixtures included in the lease, and all the hay and manure upon the premises, and a dog-kennel and other out-buildings, and the fences, gates, and many other things affixed to the freehold ; and were proceeding to pull them down in order to sell them.

Upon the present bill being filed, and before the defendant's appearance,

Romilly, for the plaintiff, upon an affidavit of the above facts, moved for an injunction to restrain the defendants from selling or removing from the premises any of the fixtures or other things which then were, or lately had been, affixed to the freehold, and the hay and manure which had been made on the premises.

The Master of the Rolls (sitting for the Lord Chancellor) granted the injunction as prayed : He had at first some hesitation about extending it to the manure, and to the fixtures ; and said he did not know that the Court had ever enjoined a party from breaking his covenant ; but at last he granted the injunction as to the fixtures and manure, as well as to restrain waste by pulling down the buildings, &c.

is merely a breach of contract; it is not a case of irreparable waste.

The order was refused.

CURGENVEN *v.* PETERS.

BILL by legatees against the executor for an account. In his examination he admitted to have a balance of 1650*l.* after all deductions or claims against the estate, and claimed no beneficial interest. *Richards* moved to have this money paid into court, before the report being made, analogous to the practice of the Court of Chancery. The Court thought the practice reasonable, and granted the order.

FAITHFUL *v.* HUNT.

THE testator left the defendants his executors, and also trustees, to sell his real estates, and out of the produce, after his debts discharged, to pay certain sums to various persons; which sums he also charged on his personal estate, on deficiency of the

other fund. The defendants sold the estates. The plaintiffs claimed a share of the produce, as legatees; but the other claimants were not made parties. On this being objected; *Stanley*, for the plaintiffs, argued, that the objection did not apply. The reason why all persons interested in the produce of a sale of land must in general be parties to a suit for that purpose, is because a good title cannot be made without it; here the estates are already sold. The fund is now in money, and is besides charged upon the general personal estate. It is therefore like any money legacy.

Hollist and *A. Anstruther* for the several defendants.

The Court thought they could not dispense with making the other claimants upon this fund parties, and directed the cause to stand over for that purpose.

ARCHDEACON and Others *v.* BOWES and Others.

A SECOND mortgagee, plaintiff, applied for a receiver. This was objected to by one of the defendants, who had purchased from the plaintiff a part of his mortgage, and who was in possession, as tenant, of a part of the estate, the rent of which was equal

to the interest he was entitled to receive upon the mortgage.

Romilly and *Hull* argued, that the appointing a receiver of this part of the estate could have no other effect except to increase the expence, as the defendant must receive back as interest what he is to pay into court as rent. One tenant in common cannot move to have a receiver appointed against another, unless where the latter takes more than his share of the profits. *Street v. Anderton*, 4 Bro. R. 414.

The Court thought that the defendant could not unite his two characters of mortgagee and tenant; and that his possession, being as tenant, could not be set up against the other mortgagee.

The order for a receiver was granted.

THE ATTORNEY GENERAL *v.* RICHARDS.

THE vessel of the defendants was seized 1st June 1794. In *Michaelmas* Term 1794, issue was joined in the information. Since that time notice of trial had been given every term, and countermanded. The goods were of a perishable nature, and had suffered very much by the detention.

Rouse and *Dauncey* moved in *Michaelmas* Term last to have a writ of delivery, without security, on the ground of delay; it was then doubted whether the Court ought to grant the writ of delivery without security, because if it did, and the Crown should have a verdict on the information, there would be no means to recover the ship, or its value. The Court therefore directed that the matter should be mentioned again after notice given to the Attorney General; such notice having been given, the application was now renewed, and now shewn against it. It was argued that, if this motion could not be made, there would be a failure of justice; the Attorney General, and even a private captor informant, might delay trial for ever; and unless the defendant can find security in double the value, his property is taken from him without any means of redress. Several cases were cited to support the application, in some of which the circumstances were less strong than in the present.

The Court thought the application reasonable, and warranted by the cases.

The rule was made absolute.

CORBETT v. BARKER.

Same day.

THIS case came on for re-hearing at the sittings after *Trinity Term* 1795.

Burton and *Scafe*, for the plaintiff, insisted, that upon the circumstances of the case the mortgagee was not entitled to set up the length of possession to bar the redemption. The mortgagee bought the equity of redemption of the father and mother of the plaintiff, and entered into possession of the premises, upon that purchase, as absolute owner; he did not therefore consider himself to hold as mortgagee, but to have all the interest of the mortgagor, and his possession was therefore as standing in the place of the mortgagor; as such he committed waste by cutting down timber, &c. which as mortgagee he could not have done (a); his answer insists upon that title, then his possession is no bar, but a confirmation of the estate of the plaintiff, who claimed as heir of the mother, after the tenancy by the curtesy to which the defendant was entitled. The defendant had two characters in him: he is bound to discharge the duties of each. As mortgagor he was bound to keep down the interest out of the rents; or, if he could be considered

Vi. ante, vol. 1. p. 138.
Baron and feme seized in fee in right of the feme, mortgage by fine, and afterwards conveyed the equity of redemption, by lease and release, to the mortgagee; the mortgagee remains in possession as complete owner for more than 20 years, during the life of the husband, tenant by the curtesy, from whom he had his conveyance: the heir of the wife is not barred of his equity of redemption by lapse of time.

(a) When the legal estate in land, and a legal charge upon it vest in the same person, for a time, he is considered as in of the principal estate, and the charge is suspended for the time that the rights are united. In equity the estate of the mortgagor is considered as the principal, that of a mortgagee as a charge upon it; perhaps the latter ought to be considered as merging in the former while they are in one person.

as holding as mortgagee, then he was bound as mortgagor to settle accounts regularly with the mortgagee, and to prevent the equity of redemption from being barred by his laches. If he is considered as having performed those duties, he protects the right of the plaintiff as well as his own interest as mortgagor. When the true rights concur, it is immaterial which was first in the person holding both. Suppose the tenant for life of the equity of redemption had bought up the interest of the mortgagee, he might equally insist, by 20 years possession, to bar all remainders; the dangerous tendency of such a rule is apparent. The utmost that can be argued is, that his possession is to be referred to both his rights; he will then be considered as in possession as mortgagee to the extent of the interest of his mortgage, and to have received the surplus profits as mortgagor. But time does not begin to run against the mortgagor, where by accounts, by paying over to him the surplus profits, or in any other way, his title is recognized and kept alive. While by any of those means the title of the tenant for life is preserved, the remainder man is in no danger, and there is no necessity for him to redeem in order to save his right. Remainder men have been allowed to redeem upon the ground that they would otherwise be damaged by the laches of the tenant for life, in not redeeming or getting regular accounts; but the defendant cannot set up his own laches as tenant for life, so as to put us under the necessity of protecting ourselves from the consequences of his misconduct. The time prescribed for redemption in equity is taken from analogy to the statute of limitations at law, which runs from the time when the right of entry accrued. During

the continuance of the life estate we had no right of entry, nor any thing in the nature of it; we had no right to call for an account, for the defendant was entitled, in his different characters, to the whole profits. The principal reason of refusing a redemption after 20 years is, to avoid long and intricate accounts; here there can be no account till the death of the tenant for life.

Romilly, on the other side.—It is clear that a remainder man may redeem during the life of the tenant for life, and that if he does not the time runs against him. *Hayes v. Hayes*, 1 Cha. Ca. 223. *Cornish v. Mew*, *Ibid.* 271, *Clyatt v. Batteson*, 1 Vern. 404. *James v. Hales*, 2 Vern. 267. *Ballet v. Spranger*, *Preced. in Ch.* 62. And a tenant by the curtesy is considered for this purpose in the same light with any other tenant for life. *Casborne v. Inglis*, 1 Atk. 606. 7 Vin. Abr. 156. If the tenant for life will not join in redeeming, the remainder man may alone redeem and then foreclose him; if neither redeems, the Court interferes to prevent the mortgagee from being disturbed after 20 years. When the time has once begun to run, it is immaterial to him who are the parties entitled, or how the interest is divided, nor is a tenancy by the curtesy any bar to it. *Anon.* 2 Atk. 333.

If it were necessary to decide the question, to what title the possession should be referred, it seems rather that it ought to be referred to the legal right under which he was entitled to the possession, than to the other, under which he could have no possession but by sufferance.

But if the argument of the plaintiffs be right, that the possession is not referable to the title as mortgagee, the case is still more against them. The equitable limitation of suits to redeem, is for the purpose of quieting titles, where the conduct of both parties amounts to a dereliction of the right to redeem. If the mortgagee does not pretend to hold in any other capacity, but admits the right of the mortgagor by accounting or otherwise, the time does not run; here the defendant took a conveyance, purporting it to be absolute; under that he has held as complete owner, committing waste, and doing other things inconsistent with his character, either of mortgagee or of tenant for life of the equity of redemption. If the mortgagor looks on and permits the mortgagee to exercise acts of complete ownership for 20 years, it is a dereliction; after that period the nature of the estate in the hands of the mortgagee changes; it becomes real instead of personal estate, descending to the heir instead of the executor; their rights and the rights of creditors are fixed at that period.

THOMSON, Baron.—Suppose after 20 years, and after the rights of the heir or of creditors are fixed by the death of the mortgagee, a foreclosure were upon all the circumstances allowed, to whom do you suppose that the mortgage money would go?

Romilly.—My argument supposes that that question can never arise. I consider the being irredeemable and being real assets, as concurrent. If the Court decrees a redemption, I apprehend they decree that the estate never became real property in the hands of the mortgagee.

It is not true that the reason of the rule is to avoid intricate accounts if the mortgagee in possession were to admit that he had been overpaid his mortgage, yet the Court would not decree redemption after 20 years. It is a positive rule, introduced by analogy to the statute of limitations at law, to compel regularity and diligence in the prosecution of every claim. The argument that the defendant was bound to account to himself as mortgagor, applies to every case; a mortgagee in possession is always bound to render an account of the rents and profits, and what he receives above his interest is received for the mortgagor, provided proper diligence is used to call for that account by applying to a Court of Equity to redeem.

MACDONALD, Chief Baron, this day delivered the opinion of the Court.—By attending to the different rights of the defendant it appears, that he stood in the place of the tenant by the curtesy of the equity of redemption; for he claims to hold under him by the last conveyance, and immediately upon taking it he entered into possession; in that character it was his duty to keep down the interest of the mortgage; as mortgagee he was to receive the interest; uniting these two characters he is to be considered as having supported the different rights and discharged the duties of each. In the general case, a presumption arises from no payment of the surplus rents being made, nor account delivered for so long a period of time as 20 years; here the presumption cannot arise, because it was the same person to pay and to receive; the case does not therefore fall within the general rule.

The decree was reversed, and redemption directed.

FRANKLIN v. SPILLING.

A MODUS was claimed for hay. The terriers described the modus to be for all mowing grass, "except clover and the like."

It was objected that as the article excepted was not known beyond time of memory, a modus containing that exception must be modern.

The Court thought that the expression in the terrier was not to be taken as an exception annexed to the modus, but merely as a memorandum that the modus covered natural hay only, and did not extend to modern artificial grasses.

SCARR v. TRINITY COLLEGE, CAMBRIDGE,
and WOOD.

Agistment is a
predial tithe.

THE original bill was filed for agistment tithe; this cross bill was to establish modus's. It stated that there are and immemorially have been certain antient townships, hamlets, and districts, within the rectory and parish of *Aisgarth* in the county of *York*, called *A. B.*, and *C.*, distinguished by certain well known boundaries and limits; that by antient

usage, custom, or prescription, all the lands within the said townships, and the owners and occupiers thereof, have been immemorially exempt from the payment of all *predial* tithes, &c. or any other satisfaction for the same than the yearly sum of 4s. 4d. payable to the rector on *Michaelmas*-day in each year, or as soon after as demanded, which hath immemorially been raised by way of contribution among the owners and occupiers of such lands, and constantly been paid by them, or some of them, to the said rectors, &c.

The cause was argued in a former Term, and several questions arose; the most material was, Whether the modus laid for all *predial* tithes, covered tithe of agistment? It was proved that agistment tithe had never in fact been received, and that, by the opinion of the country, it was not payable; the places for which the exemption was claimed were very extensive moor lands, about 20,000 acres.

Partridge, Anstruther, Campbell, and Topham, for the plaintiffs, argued, that agistment is a predial tithe. Those tithes are called predial which arise immediately from the ground; those are mixed which arise by the improvement or increase of some animal. Agistment tithe is paid, not for the increase or improvement of the animal agisted, but for the grass eaten by it, and is proportioned to the value of the grass, not to the value of the actual improvement; *Freem. 329. Holbeach v. Whadeock, Hard. 184. Ellis v. Saul (ante, vol. 1. p. 332.) Linw. 194. Degge 217*; therefore, where the occupier of land does not agist his own cattle, but those of strangers, the tithe is

the agistment of barren cattle is due from the occupier, as being owner of the grass for which the tithe is paid; but if the cattle are profitable, the owner of them is accountable for the tithes. *Underwood v. Gibbon*, *Bunb.* 3. *Fisher v. Lemen*, 9 *Vin.* 38. *pl.* 7. If the grass has before paid tithe of hay, no tithe is due for agistment of the aftermath; then the tithe is attached to the grass, not to the cattle.

Burton, Graham, Hollist, and Bell, for the defendant, maintained that agistment is a mixed tithe. They considered predial tithes as those which are taken immediately from the ground, and relied much on the *stat.* 2 & 3 *E.* 6. *c.* 13. as proving that distinction. By that statute, all predial tithes are to be set out in their proper kind, on penalty of forfeiture of the double value; this presumes that all predial tithes are such as may be set out; agistment tithe cannot. If it were the tithe of the grass, it would, when severed from the ground, be subject to the same rules as hay or any other tithe severed in any other way; but if hay or turnips pulled up are given to profitable cattle, as cows or sheep, two tithes are due; one for the hay on severance, the other for the increase of the cattle: so if the grass agisted paid a tithe on severance, a second tithe would be due for the increase; but the law is otherwise; it cannot, therefore, be a tithe due for the grass on severance, but for the depasturing of the cattle, and the value of the grass is only the mode of ascertaining the value of the agistment.

The rule that agistment tithe shall be paid by the occupier, not by the owner of the cattle, is a mere

rule of convenience. 1 *Roll's Abr.* 656. *Deg. p.* 2. c. 5. If it were a rule arising from the nature of the tithe, as due for the grass, and therefore payable by the owner of the grass, the same rule must hold as to commons; a commoner would not be liable to agistment tithe, for the grass is not his; but the law is otherwise. *Bunb.* 3. Animals reared for the plough or pail do not pay tithe when young; if the tenant changes his mind and sells them, agistment tithe becomes due from the first; this must be for their eating; if it were tithe of the grass, it would have been due immediately, and would not have depended on a future event. Accordingly Archbishop *Winchelsea*, in his Institutions, first considers the tithe of corn and other things clearly predial; he then treats of wool and other mixed tithes, then of pasturage, lastly of personal tithes, considering agistment tithe as something between mixed and personal tithes; mixed, as being due for the cattle; personal, as consisting of a money payment only. *Linwood* 194, (n), treats it as only "*tantum prædialis*," i. e. resembling predial tithes. *Watson* ranks it as a mixed tithe.

They also argued that the sum of 4s. 4d. for 20,000 of pasture land was so small that it could not possibly be meant to comprehend agistment tithe.

The original bill being only for agistment tithe, the cross bill could not be filed to establish a modus for predial tithes, for no predial tithe has been demanded.

MACDONALD, Chief Baron.—We are clearly satisfied that this is a predial, not a mixed tithe.

The distinction is, that predial tithes arise immediately from the soil; those are mixed which arise immediately, through the increase of animals. The arguments used on the part of the farmers prove in a satisfactory manner, that agistment tithe is the tithe of the grass eaten, and therefore it arises immediately from the soil. The mode in which the different sorts of tithes have been classed, by writers upon the subject, can have little weight in such a question; and the statute of *Ed. 6.* so much relied on, does not seem intended to draw an accurate line between the different species of tithes. It affixes a penalty on not setting out predial tithes; that must be understood as relating to those only which are capable of being set out.

The next question arose upon the description of the places for which the modus was claimed. One of the divisions was proved in evidence not to be a township or hamlet; but it was proved that the lands described in the bill by that name were known as a division or district of the parish, and the bounds were defined in evidence.

It was objected that one who claims to establish a modus or other custom against general right, must define accurately and truly the place to be covered by it. The words "townships, hamlets, or districts of *A., B., and C.,*" cannot be taken to mean that each of the three is a township, a hamlet, and a district; and if that were the meaning, it is disproved in evidence as to one at least. If it is left indefinitely as to each that it is either a township, or a hamlet, or a

district, this is bad; there may be a hamlet of *A.*, and a district of *A.*; For which is the modus claimed? Upon the face of the bill they may all be districts, and not townships or hamlets; one of them is so in fact. But although a township or hamlet is a known legal definite quantity of lands, a district is not; as the bounds are not considered by the law as certain and definite, they must be defined by metes and bounds in laying the modus. *Scott v. Allgood, ante, vol. 1. p. 16.* Here not even the computed number of acres is set forth. The averment that these districts are distinguished by well known boundaries and limits, cannot avail; in every case the setting out of boundaries might equally be dispensed with by an averment that they were well known.

The *Court* thought the description sufficient. In that part of *Yorkshire*, consisting of extensive moors, the parishes are divided into certain districts, which are as well known divisions as the parish itself; here the districts are stated to be distinguished by well known bounds; if that is true, as is proved in evidence to be the case, it seems perfectly useless to set out the limits in the bill.

Another objection was, that the modus was claimed for the owners and occupiers, whereas the owners as such could not claim a custom to be exempt from tithes, for none are due from them.

The objection was over-ruled.

It was objected that the bill did not state the modus to be demandable at all; it only averred it to

have been immemorially paid—not that it was immemorially payable. It may be that the modus may now be found inconvenient to the farmers; there is no averment that it is mutually binding. It is said to have been raised and paid by the owners and occupiers or some of them; this is no averment of a right to demand it against any one; the owners are not liable in common cases to pay a satisfaction for the tithes; there must be a specific averment, therefore, to make them liable to pay a satisfaction for the exemption of the occupiers from tithes.

To this it was answered that the claim of exemption from payment of tithes in kind, or any other satisfaction for the same, than the sum of 4s. 4d. was an admission of that sum being due and payable. A sum payable as a modus for any tract of land, as an ancient form, &c. is in its nature demandable from any occupier of any parcel of the place covered; an averment of its being so would be superfluous. It is stated to have been paid in fact by owners and occupiers *or some of them*; that is, by some of them for themselves and the rest, all being liable. The introducing the “owners” as liable to it, may be understood only as referable to those owners who are liable to it from their situation as being both the occupiers and owners of their lands; or it may be understood that both the owners and occupiers are liable, and the clergyman has double security for his demand. Owners may be liable. *Clarke v. Ord, ante, p. 638. Cowper v. Andrews, Hob. 39.*

The Court over-ruled the objections.

The averment that the sum due as a modus had been immemorially raised by way of contribution, was argued to be contradicted by the evidence. In fact no contribution had ever been made; the money was sometimes paid by a few farmers, more frequently raised out of the toll of a cattle-gate, to which the proprietors of the three districts were not all entitled, nor were the others exclusively the owners of it; at other times it was paid out of the profits of some quarries which belonged to a manor, of which the owners of lands in those districts were entitled to the profits.

It was insisted that the averment of payment by contribution, being introduced as a part of the modus, must be proved; the fact of contribution cannot be shewn in any instance, and the payments out of the cattle-gate, in particular, have no resemblance to a contribution among the tenants of these lands; it is a payment by other persons.

The *Court* thought the evidence sufficient to support the averment of a contribution; as between the rector and the farmer the fact of payment alone is material, the contribution stated is not a part of the modus itself; it is not averred to be necessary that the rector shall call upon each farmer for his share, and take the risk of their general payments. He is entitled to call on any one for the whole; as between him and the tenants the satisfaction for tithes is then complete. The bill goes on to state how the one who has paid the whole shall be reimbursed by contribution; but contribution may be made in any manner the te-

nants may agree ; and whether in fact it may in every case have been levied from all, in just proportions, or whether the money of strangers may not have been mixed in the payment of this trifling sum, are questions of no moment as between the rector and the tenants ; being in its nature contributory, every payment must be referred to that nature, and is, as between the rector and the tenants, a payment by contribution.

The following objections were also taken to the form of the bill. That the modus being contributory, all persons who were liable to the contribution, or to be called upon for the whole by the rector, should have been made parties, so as to be bound by the decree.

That the rector, the college, being an eleemosynary foundation, of which the King is visitor, the Attorney General should have been a party.

That the bill was bad as joining suits improperly. It prayed liberty to examine aged witnesses *de bene esse*, and that their testimony might be recorded, and then went on to pray relief in the same matter to which the examination of those witnesses went.

These objections were over-ruled.

An issue was directed to try the modus.

Sir WATKIN LEWIS and Others v. MORGAN and Others. *Same day.*

SIR *Watkin Lewis*, being seized in fee of certain estates, subject to a mortgage for 5000*l.* to Dr. *Kent*; and being also possessed for life of other estates, with the reversion in Lady *Lewis* in tail; and being desirous, with the consent of Lady *Lewis*, to raise a further sum on the security of those estates, in 1773 employed the defendant *John Morgan*, as his attorney and agent, as well for the purpose of transacting the said loan and security, as generally in all his law and money concerns. In *March 1775*, Sir *Watkin* and Lady *Lewis* settled the estates (by several fines and recoveries) to the use of Sir *W. L.* for life, remainder to Lady *L.* for life, remainder to their issue in tail, but subject to a term of 500 years in the estates before belonging to Lady *L.* created by the said settlement, and vested in *George Morgan* and *James Morgan*, the brothers of the defendant *John Morgan*, in trust, to raise by sale or mortgage the sum of 12,000*l.* and thereout, in the first place, to pay and discharge the said mortgage of 5000*l.* to Dr. *Kent*, and to pay the residue to Sir *W. L.*

On 2d *June 1775*, the trustees mortgaged the trust premises to *Farrer* for 6610*l.* being money in his hands in trust for the defendant *John Morgan* for life, remainder to his wife, &c. according to their marriage settlement; of this sum of 6610*l.* for which the mortgage was given, 2400*l.* was a bond, the consideration of which was not explained, due from Sir

W. L. to *Chardin Morgan*, (another brother of the defendant,) and assigned by him to *Farrer* as such trustee; the remainder was not paid in discharge of *Dr. Kent's* mortgage, nor to *Sir W. L.* but to the defendant *John Morgan*, who kept it with his other cash at his banker's. On the 2d and 3d *April* 1776, the farther sum of 1390*l.* was raised by another mortgage to *Farrer*, as trustee in *J. Morgan's* marriage settlement, and 4000*l.* by mortgage to one *Wilde*. Soon after this last transaction, the mortgage to *Kent* was paid off; the remainder of the money was paid into the hands of *Mr. John Morgan*, as agent and banker for *Sir W. L.* *Sir W. L.* had frequently settled accounts with *Mr. John Morgan*; the last balance was struck in 1777, and a note given by *Sir W. L.* for the balance admitted to be due from him, and all the vouchers which had been produced at the time of settling the account were delivered up to *Sir W. L.* In these accounts were contained several bills of costs, which were not taxed, nor disputed except in one very trifling item. Soon after these transactions, the defendant *John Farrer*, as mortgagee, (in trust for *Morgan's* marriage settlement,) demised the whole premises mortgaged to the defendant *John Morgan*, for sixty-one years, if he should so long live, in trust to pay the interest of the mortgage, and then to retain to himself a salary of 40*l.* a year for his trouble; *Sir W. Lewis* was prevailed upon to join in securing this salary, which was afterwards advanced to 60*l.* In 1778, the defendant *Mr. John Morgan* entered up judgment on a warrant of attorney, obtained from *Sir W. Lewis*, for the above balance and other debts, and took out an extent against his other estates. The bill

was filed in 1783, and prayed to open the whole accounts. The defendant insisted on the accounts settled, as a bar to that part of the demand.

The *Attorney General, Plumer, Nedham, Woodeson, and Hubbersty*, for the plaintiffs, insisted, that on the face of the transactions at large, as well as in the particular accounts, the conduct of the defendant was such as required investigation. The term of 500 years was raised for the purpose; first of paying Dr. *Kent's* mortgage, and then of paying over the residue of the money raised to Sir *W. L.* The money raised was first applied to discharge a bond to *Chardin Morgan*, contrary to the meaning of the trust; no part of Dr. *Kent's* mortgage was then paid, nor was any money paid to Sir *W. L.* but the money lay in Mr. *Morgan's* hands, without interest, while interest was accumulating on Dr. *Kent's* mortgage, which it was intended to pay off. This is a clear breach of trust. The salary to Mr. *Morgan*, acting for himself as mortgagee in the receipt of rents, would be usury at common law, and is a clear imposition on his client,

They showed that the accounts were inaccurate, and the balance of almost every one overcharged; the bills of costs were so exorbitant, that, upon some of the late bills being referred to an arbitrator, very great deductions were found necessary; the items mentioned in the schedules appeared excessive. In the account, the defendant charged interest for sums due to him, at the time when much greater sums belonging to Sir *W. L.* were in his hands, or in those of his banker, in his name, and mixed with his own cash, carrying no interest. Some items charged

in one account, and which had gone towards making up the balance, were charged again in the subsequent account. The whole accounts appeared confused; and the items were generally gross sums, without entering into the particulars of each charge.

They insisted that the account should be open in the first place for the taxing bills of costs included in the accounts. *Drapers Co. v. Davies*, 2 *Atk.* 295. The relation between an attorney and client makes it the duty of the former to advise his client in all cases what is his interest and right: If he himself is the party contracting with his client, and the confidence is continued in that transaction, the same duty continues; the attorney is to point out his client's interest, even against himself; where this confidence is abused, the settling the accounts, and attempting by that means to shut the transaction, cannot avail to prevent the investigation of the court. *Walmsley v. Booth*, 2 *Atk.* 25. *Vaughan v. Lloyd*, before Lord Thurlow, 1781. *Newman v. Payne*, 2 *Vez. jun.* 199. They also insisted that the accounts being on the face of them erroneous and inconsistent, and the answer insisting to retain the whole settled balances as just and true accounts, it was necessary that the whole should be opened, from the evident impossibility of that statement being true.

As to the vouchers, they insisted that those given up could not be such as would authenticate and support an account upon the face of it inconsistent and impossible; therefore, not being vouchers for these accounts, their being given up is no answer to opening these accounts. Such of the

vouchers as could be found they offered to produce, and to admit the oath of the defendant as to the import of those lost; and insisted that with that condition the accounts should be opened, notwithstanding the delivery up of the vouchers. 2 *Cha. Ca.* 2. 1 *Eq. Ca. Abr.* 4. 1 *Cha. Rep.* 146.

Richards and *Roupel* insisted on the length of time since the accounts were settled and the vouchers delivered up, as barring all inquiry, unless where the plaintiff could specify particular errors. The errors stated in the bill are not proved, and therefore the allegation fails. *Brownell v. Brownell*, 2 *Bro. R.* 62. *Johnson v. Curteis*, 3 *Bro. R.* 266. They then went through the accounts, and argued that they were fair and honest.—It is not necessary that bills of costs shall be taxed. The client may waive it. It is enough if he understands the bills. The taking one item off the bills of costs, is an admission that all the rest were examined and agreed to. The plaintiff being a barrister, cannot be considered as incompetent to protect himself. There is no presumption of superior knowledge on either side.

See *Pistor v. Dunbar*, ante, vol. I. p. 186.

MACDONALD, Chief Baron, stated the case, and observed that the real nature of the transactions between the parties, might be gathered from the result of their connexion.—Sir *W. L.* possessed of a very considerable property, mortgaged, originally, only for 5000*l.* is led to give up the whole management of it to the defendant, for the purpose of clearing himself of his difficulties; and he now finds his estate incumbered to more than three times the original amount; himself having received comparatively

no benefit either from the rents during all that period, or from the sums for which the estate is now pledged.--As to all the transactions since the last account settled between the parties, there is no doubt that Mr. *Morgan* must account. But it is contended that the account ought not to be carried further.

It is to be observed that we are here in the case of an attorney dealing with his client. An attorney has often been stated to be an officer of the Court, bound to protect his client against all acts which may be detrimental to his interest; bound to apprise him of the consequences of his actions, and to have a ready account of the circumstances belonging to them, that he may be able to lay a regular statement before the court, when called upon. Accordingly Lord *Hardwicke* observes in *Walmsley v. Booth*, that the case of an attorney and client is stronger than any of the cases of influence or coercion which he had before enumerated; and that therefore even payment of the bill and a receipt given, or a mortgage, or other security obtained for the payment, shall not prevent the bill being taxed; accordingly, in his reconsidered opinion, he proceeds on these public grounds, to set aside the bond there obtained. In *Newman v. Payne*, before the present Lord Chancellor, the same language was held, and a similar decision pronounced upon the general principles of justice, arising from the relations between the parties.

From the principles acted on in these cases, from the character of an attorney, as an officer of the Court, having a share in the administration of its

justice, in whom the client must not only from choice but from necessity place confidence; the Court will require an account of the conduct of that officer, where they see any grounds of suspicion. An attorney is accountable to the Court, as well as to the party.

The objections made to entering into an account of these transactions are as follow:

1. That no specific errors in the accounts have been alleged and proved.
2. That they are settled accounts.
3. That the vouchers have been delivered up.
4. The length of time.

As to the awards it will be unnecessary to consider them. They can have no other avail except to shew that the charges of one attorney were exorbitant in the opinion of another.

As to the first objection, it must be admitted that, so far as relates to errors charged in the bill, the plaintiff's case is by no means a strong one; but on comparing the schedules and the answer, the accounts turn out to be without any sort of accuracy, without dates, and so confused and perplexed, as materially to vary the balance; with such irregularity and obscurity throughout, as to baffle the attempts of ingenious argument, and to render the answer and schedules taken together completely unintelligible. Upon the last account a balance of 567*l.* was secured by note to Mr. *John Morgan*. This is open to the observation before made. The account was settled in such a manner as no at-

torney of reputation would have suffered his client to settle and allow any account, much less such an account. This answers the second objection.

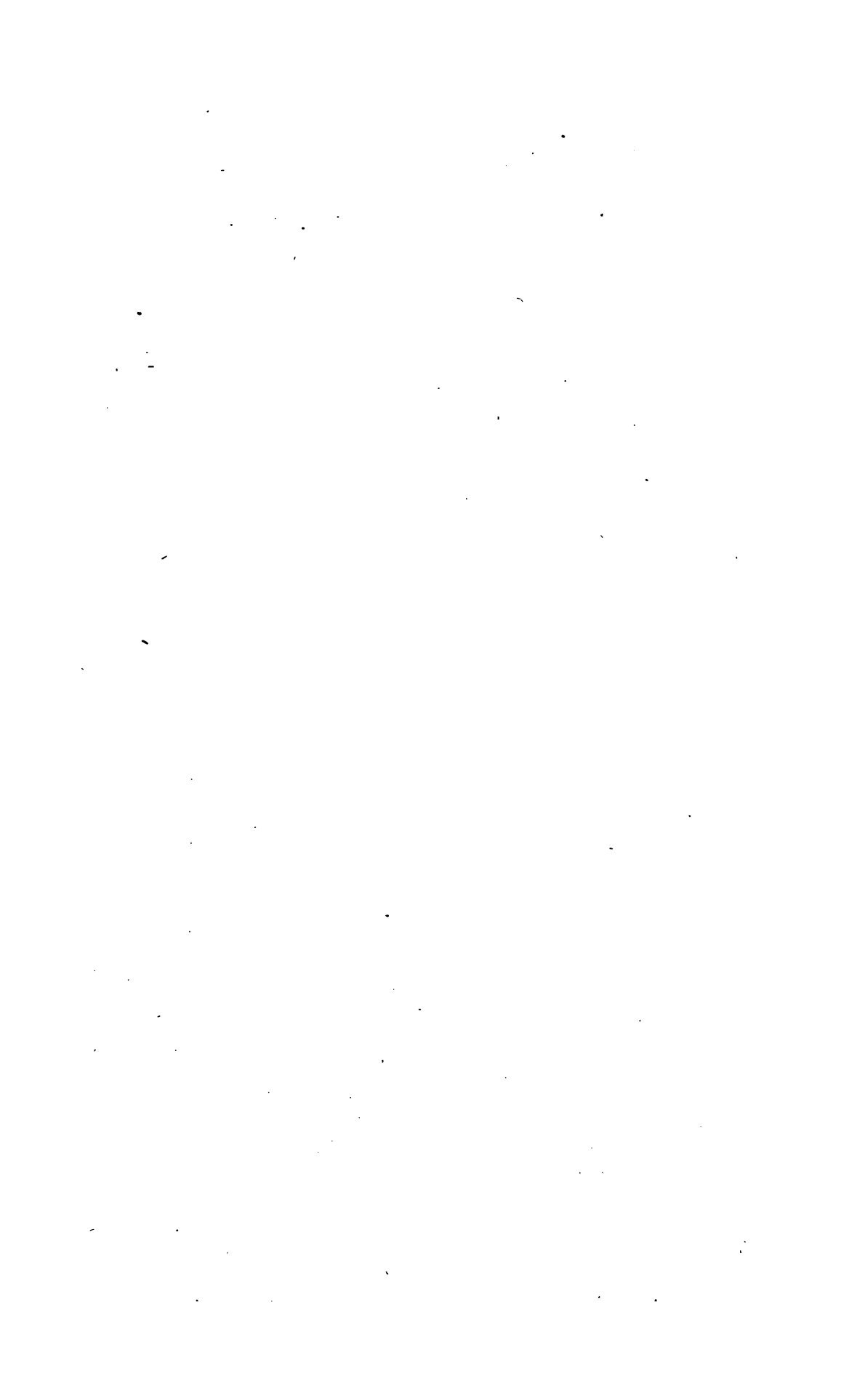
The third objection is, that the vouchers have been delivered up. Where the Court objects to the accounts themselves upon the face of them, there is the same reason to doubt of the sufficiency of the vouchers verifying those accounts: From the unbounded influence of the attorney over the client, arising from design on the one hand and facility on the other, the sufficiency of the vouchers cannot but be questioned. The danger of calling to account a party disarmed of his vouchers, is certainly to be considered as very serious; it is however to be presumed that an attorney keeps a regular account, to which great weight must be given, and the other party must either produce the vouchers given up, or give an account of them. The plaintiff's counsel consent that the vouchers shall be returned, and that the plaintiff must be satisfied with the oath of the defendant, as to the import of those vouchers which were delivered up, and which the plaintiff is not capable now to produce. In *Vaughan v. Lloyd*, that was not held a fatal objection. There it was supplied, and so it may here, by permitting the party's oath to supply the place of the vouchers.

With respect to the particular situation of the plaintiff, as a barrister, magistrate, &c. that has no weight against the clear fact of his having delivered

himself over to Mr. *Morgan*, as his sole legal adviser and confidential attorney.

The last objection arises from the length of time. The last settlement of accounts was in 1777. The bill was filed in 1783. On this part of the case we have before us the authority of Lord *Hardwicke*, in the case of the *Drapers Company v. Davies*, a case very similar to the present, for opening the accounts, where an attorney had improperly obtained securities from his client seventeen years before, for bills which upon the face of them contained improper items.

Upon the circumstances therefore of the complicated and confidential relation in which these parties stood, and the unsatisfactory accounts contained in the bills delivered, and the whole transactions, we are of opinion that the dealings between these parties, Sir *W. L.* and Mr. *J. Morgan*, ought to be examined, and the account gone into; the plaintiff to produce all vouchers delivered up to him, and still in his possession; and where a voucher is not to be found, and is sworn to, that it shall be considered as an established fact that such voucher did exist.



CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER,

IN

MICHAELMAS TERM,

37 GEORGE III.

BUCKLER v. BLYTH.

Tuesday,
15th November.

DAUNCEY obtained a rule to shew cause why the rule to bring in the body of the defendant should not be set aside as irregular.

The rule on the sheriff to return the writ, expired two days after the end of term; a rule to bring in the body, taken out next day, but tested on the last day of term, was held regular.

The *quo minus* was returnable 11th *June* last. On that day the plaintiff obtained a rule to return the writ, but did not serve it till the 13th, so that it did not expire till the 17th. The 15th *June* was the last day of term. On the 18th, the plaintiff took out this rule, to bring in the body, dated as of the last day

of term. The regularity of this practice was disputed. Cause was shewn by

Durnford. He insisted that this was within the general rule of all the courts, to permit side-bar rules to be taken out in vacation, tested, for form's sake, of the preceding term, but taking all their privileges or disabilities from the real date.—He stated this to be the constant practice in all the courts.

Dauncey argued that the rule of allowing any proceeding to be tested of a date different from the real, supposes that it legally might be of that imaginary date. But this case is governed by the *King v. The Sheriff of Cornwall*, 1 Term Rep. 552. where it is held that this rule cannot issue in vacation, tested in term, although such a practice had prevailed among the officers of the court.

Durnford. There the rule was tested subsequent to its really issuing. The case was determined on the ground that the rule presumed a neglect of the sheriff, which had not taken place at the real time of taking out the rule.

The court, on consulting with the officers, held the practice regular, and

Discharged the rule.

DENN on dem. MELLOR v. MOOR.

IN ERROR.
Wednesday,
16th November.

THE defendant recovered the premises in question in a former ejectment against the present plaintiff, the Court of King's Bench deciding in his favor, on a case reserved for their opinion (see *5 Term Rep.* 558.) This ejectment was brought for the purpose of putting the question upon the record. The special verdict stated the same case before decided by the court of King's Bench, and on their judgment being given, without argument, for the defendant, this writ of error was brought. The case was this :

John Carr, being seized in fee of the premises in question, copyholds of inheritance, and also of another copyhold estate at *E.*, and having surrendered the same to the use of his will, devised as follows :

" I give and devise unto *N. Lister*, of, &c. all my
 " customary or copyhold messuage or tenement,
 " with the appurtenances, at *E.* &c. ; all the rest
 " of my lands, tenements, and *hereditaments*, either
 " freehold or copyhold, whatsoever and whereso-
 " ever, and also all my goods, chattels, and per-
 " sonal estate, of what nature or kind soever, *after*
 " *payment of my just debts and funeral expences*, I
 " give, devise and bequeath the same unto my wife
 " *Cecily Carr* ; and I do hereby nominate and ap-
 " point her sole executrix of this my will."

A devise of all
 " my lands, te-
 " nements, and
 " *hereditaments*
 " to *A.*" will
 carry the fee if
 that appears to
 be the general
 intent of the
 testator.

Whether the
 word " heredi-
 tament" alone
 will carry a fee.
 Qu. ?

Whether a de-
 vise of lands to
A. " after pay-
 " ment of my
 " just debts and
 " funeral ex-
 " pences," will
 carry the fee.
 Qu. ?

The lessor of the plaintiff claimed under *Cecily Carr*, who was since dead; the defendant as heir at law; the question was, ~~Whether~~ *Cecily* took an estate for life or in fee under the will?

The case was twice argued; first, in *Trinity Term*, by *Lamb* for the plaintiff, and *Wood* for the defendant: and now by *Chambre* for the plaintiff, and *Law* for the defendant.

For the plaintiff, it was argued to this effect:

Whatever may be the legal effect of the words used, the intent of the deviser is clear to give to his wife the whole of his property, with the single exception of the life-estate in the copyhold at *E.* given to *N. Lister*. The only question is, Whether there are words sufficient in law to execute this intent?

The rule of construction by which a devise of "all my lands at *A.*" is held only to carry a life-estate, has often been admitted by the Judges, in deciding according to it, to be in general contrary to the real intention of the testator. Accordingly where any words appear that will admit a legal construction corresponding to that intention of the testator, the law gives them that construction rather than any other. Where the words used may be construed as descriptive not merely of the lands devised, but of the whole interest of the deviser in those lands, that construction is adopted, in order to effectuate the intention. *Barry v. Edgeworth*, 2 *P. Wms.* 524. and the cases cited in *Mr. Cox's* note, *ibid.* *Holdfast* on dem. *Cowper*

v. Marten, 1 *Term Rep.* 411. *Fletcher v. Smiton*, 2 *Term Rep.* 656.

The word "hereditament," here used, is at least as extensive as the word "estate," which occurs in those cases. It means to include every thing which can be inherited^(a), and therefore seems more appropriate for passing the inheritance, than the word "estate." Accordingly it has been held in several cases to carry a fee. *Willows v. Lydcott*, 3 *Mod.* 229, reversed in error. 2 *Vent.* 285. *Smith v. Tindal*, 11 *Mod.* 102.; by *Holt* and *Powis*, Justices, *Powell J.* differing^(b), and *Gould J.* giving no opinion on the point. This part of the decision is not mentioned in the report of the case in *Salk.* 685. because it is under the title *Warranty*, and the whole attention is directed to that part of the case which treats of collateral warranty. So, by *De Grey Ch. J.* 3 *Wils.* 418. *Hopewell v. Ackland*, *Salk.* 239. 1 *Com. Rep.* 169. is not a decision to the contrary. The determination of the Court there is that a fee passed; the opinion that the word "hereditament" would not have had that effect is only the opinion of the Lord Chief Justice *Trevor*. *Canning v. Canning*, in *Moseley* 240. goes entirely upon the authority of that dictum, mistaking it for an adjudication of the Court. Besides upon examining the register's book it appears

(a) See 1 *Vent.* 300. 2 *Lev.* 169.

(b) It is to be remarked that Mr. J. *Powell*, who there differs from the Court, and holds that "hereditament" does not pass a fee, maintained the contrary opinion singly in *Willows v. Lydcott*, 3 *Mod.* 229. which case is there said to have been reversed in error, according to his opinion.



that in the latter case there was a charge of 30*l.* a year to the heir, which is omitted in the statement of the case in *Moseley*, and which clearly ought to have been held to carry the fee; the case therefore seems upon the whole not deserving much attention.

The debts being charged on the devisee is sufficient to carry a fee. The Courts have always held that where there is a perpetual charge created, or which may by possibility extend beyond the life of the devisee, the testator shall be presumed to have given a fee^(a). So where payments are directed to be made by the devisee; for if he had only a life-estate, the profits during his life might by possibility be less than his payments, and so he might lose by the devise, whereas the law always presumes that a benefit was intended. *Frogmorton v. Holiday*, 3 *Burr.* 1623. Lord *Mansfield* there says, "Let a sum charged on a devise be ever so small, it shall pass a fee." *Cliffe v. Gibbons*, 2 *Ld. Raym.* 1325. was a devise of the residue of the testator's estate, after debts and legacies paid; the charge was held to raise a fee. So *Doe on dem. Palmer v. Richards*, 3 *Term Rep.* 356. There the devise was of the rest of the testator's lands and hereditaments, and personalty, "his legacies and funeral expences being thereout paid." That is exactly the present case, except that the words here are "after payment of my just debts and funeral expences."—If there is any difference, the present seems rather more strongly to charge the devise with these pay-

(a) See 3 *Burr.* 1533. and 1618. *Smith v. Tindal*, *Salk.* 685. 11 *Mod.* 102.

ments, it being in the shape of a condition precedent, and the devisee therefore liable immediately.— Lord *Kenyon* there adds a strong reason for the determination, that if the devise did not extend to the fee, the fund might not be sufficient to pay the legacies. Here it is stronger, being the case of creditors. The word “*thereout*” paid, in that case, makes no difference, when it is observed that the personalty is included in the residuary bequest, and it is not a particular charge on the land.

Argument for the defendant.

In the construction of a will, the intention of the testator is the sole guide; but that intention is to be discovered according to those rules which the law has laid down; whenever the words used have a definite legal meaning, the Court cannot impute to the testator a different meaning or an intention inconsistent with it. *Per Lord Mansfield, Cowp. 355. 3 Term Rep. 358.* The general rule of law is, that the heir shall not be disinherited unless by clear legal construction of the words of the devise.

The testator had given a particular message to *N. Lister*, by words which clearly do not carry a fee, being merely descriptive of the thing, not of the estate in it; the words “all the *rest* of my “lands,” &c. are the same as if the testator had said “all my *other* lands,” &c. and are explained by the preceding devise to describe only the subjects of the devise, not the interest given.

The testator therefore evidently intended the same interest to *N. Lister* in the messuage, which the wife was to have in the other lands; but the residuary clause, if it gives her the fee in the other lands, must give her the fee of that messuage also, as the effect of the demise cannot be split. Then the case must be argued, as if she were now claiming the fee of that messuage; such a claim can only be made out by shewing strong technical words to convey a fee, even against the actual intention of the testator, who probably meant the fee to go to *N. Lister*.

The word "hereditament" is merely a more extensive term to describe the things granted, than "lands and tenements," including advowsons, rents, annuities, &c. It means the thing which may be inherited. *Co. Lit.* 6. *a.* and it has been accordingly determined that this word shall not carry the inheritance. *Hopewell v. Ackland*, *Canning v. Canning*, and by Lord *Kenyon* in *Doe v. Richards*. *Canning v. Canning* is in point to the present case in every circumstance. In *Hopewell v. Ackland*, the distinction between *hæreditas* and *hæreditamentum* is pointed out in argument and acted upon by the Court. In *Smith v. Tindal* this word occurred, but the decision of the Court did not proceed upon it; *Salk.* 685. And in the report of the case in 11 *Mod.* 102. a difference of opinion upon this point is stated, but the determination was upon other grounds. In *Lydcott v. Willows*, the Court of King's Bench were of opinion, that "hereditament" did not carry a fee: the case was reversed in error on other grounds. 2 *Vent.*

286. The expression of *De Grey* Ch. J. in 3 *Wils.* 418. is a mere *obiter dictum*.

The words "after payment of my just debts and "funeral expences" make no difference. This is not a personal charge on the devisee, but merely a general charge on the real and personal estate of the testator, the real not being liable except on deficiency of personal assets; and therefore it shall not carry a fee. *Dickins v. Marshal*, *Cro. Eliz.* 330. *Canning v. Canning*, *Moseley* 240. where the reason is given; it is only a charge in Equity, and the devisee cannot be a loser, for he is only answerable to the amount of the assets descended. *Merron v. Blackmore*, 2 *Atk.* 341. The same doctrine is recognized by all the Judges in *Doe v. Richards*, and the word "thereout" is rested on to take that case out of the general rule. In the cases of *Hopewell v. Ackland*, *Smith v. Tindal*, and *Baddely v. Leppingwell*, there were perpetual charges. —In *Cliffe v. Gibbons*, the devise was of all the residue of the testator's *estate*, which word has always been held sufficient to carry the fee, independent of any charges upon it.

On the second argument, *Chambre*, when proceeding to reply, was stopped by the Court.

EYRE, Ch. J. I should feel a great deal of difficulty in deciding this question in favor of the plaintiff upon the mere construction of the word "hereditament." The general import of that word seems to be, any thing in which an estate of inheritance may exist. A life-estate may be in an

hereditament, and I should therefore pause before deciding that that word imports a fee.

I should also be very slow to determine that the words "after payment of my just debts and funeral expences" carried a fee, as a necessary implication from the nature of this charge. It appears to be merely an equitable charge, from which it is impossible that the devisee could ever be a loser.

But upon the whole of this will we can have no difficulty in perceiving the clear intent of the testator, to give by the residuary clause every thing which he had not before devised. The words used certainly are sufficiently extensive to carry every thing, if the intention so to do is otherwise clearly shewn, whether they might alone be sufficient proof of that intention or not. There are here apt words to carry the fee, in order to effectuate the intention, according to what was observed by Lord *Mansfield* to be necessary (a). The clause relied on is a general sweeping clause, evidently intended to give the whole residue; it couples the whole realty and personalty into one bequest, using the same expressions for giving both, certainly conveying the whole interest in the personalty, in the realty not narrowing it, and carefully employing the largest and most extensive words to take in every thing. The intent therefore is most apparent to give the whole residue to the wife.

Without then deciding upon the construction of the words, and attempting to reconcile the cases

(a) *Cowp.* 355.

which seem to be contradictory, and without saying that it is necessary to give a fee to the wife, in order to effectuate the charge of paying the debts, I am of opinion that there is a clear intent to convey the whole interest, and that the words are sufficient to support that intention.

The other Judges being of the same opinion,

The judgment was reversed.

POTTS v. DURANT and Others.

THE plaintiff claimed tithes as vicar of *Flixton* in *Suffolk*. He offered as evidence of his right, an instrument without a seal remaining, which purported to be an endowment, dated 1321, and another dated 1412, having a seal annexed, purporting to be an *inspeximus* under the seal of the Bishop of *Norwich*, and containing a copy of the former, which it stated to be then in the registry of the diocese. These two papers belonged to, and were produced by Mr. *Astle*, (the keeper of the records in the Tower, and himself a considerable collector of antient MSS.) who had purchased them at the sale of the effects of the late Mr. *Martin*, an eminent collector (a).

An instrument purporting to be an endowment, without the seal, and another purporting to be an *inspeximus* thereof under the seal of the Bishop, were rejected as coming out of private hands unconnected with the matter in dispute.

(a) Mr. *Martin* obtained this and many other MSS. through his wife, who was widow of Mr. *Leneve*, the keeper of the re-

ment; it becomes a terrier by being returned to the Bishop. An endowment is like any other grant. The custody is immaterial, unless as a circumstance affecting the credit of the evidence produced. The most suspicious of all custody is that of the party interested in the contents, yet all deeds and charters relating to private concerns are in that custody. The register of the diocese is the repository of ecclesiastical endowments, and other deeds, as the private charter-chest of an individual is expected to hold the muniments of his estate. Yet evidence adduced from other quarters may be good.

It is not true that the registry of each diocese contains all the muniments which properly ought to be lodged there; many are extremely defective, none perfect. There being no endowment of this vicarage found there, while it is clear one did exist, proves a deficiency in this case. The Augmentation-office is still more imperfect. On the dissolution of the monasteries, few of them had any desire to preserve their muniments for the use of their plunderers. Many carried them to Rome, others suffered them to be dispersed in private hands; many of which have been saved and collected by the curiosity of individuals. If a man has lost a deed for any space of time, does it lose its authenticity by ever having been in the casual possession of a stranger? It must even be argued that a document which has ever been suffered to go out of the public custody, although afterwards restored, has for ever lost its claim to be admitted as evidence. In this case, the endowments coming into private hands is accounted for either from the history of the dissolution of the monasteries, or by

supposing it to have been taken out of the registry by Mr. *Lenave*.

Supposing the original endowment not to be admissible, as not having a seal nor the authenticity derived from public custody, that will let in the in-speximus as evidence. It is a copy, and the original lost. The seal proves itself independent of all other circumstances(a). Even a new grant from a corporation is so proved.—The production of the first without a seal, which is the essence of a deed, explains the necessity of the convent obtaining from the Bishop this confirmation of its existence.

The case of the *Shandeaus* peerage turned upon the nature of the paper produced; it was a pedigree made out by a stranger, who did not appear to

(a) The following note was found in the hand-writing of Mr. *Martin*, out of whose possession the endowment was purchased by Mr. *Astle*.

"The Honourable *James West*, Esq. Member of Parliament for *St. Alban's*, has the original deed, in which the abbot and convent of *St. Edmund's Bury* convey to *St. Saviour's Hospital* in *Bury*, two portions of tithes of the demesne of *Herringwell* in *Suffolk*. This deed was produced before the four Barons of the Exchequer on hearing the cause between *Burton* clerk, and *Hobden*, Esq. concerning the tithes of *Herringwell-farm*, in 1756."

Upon referring to the minutes in the *Exchequer chamber* book, 26th February 1756, it appears that a deed corresponding to the above description was read in evidence.

Mr. *West* was a great antiquary and collector of curious MSS.

have had any access to know the correct history of the family, and not recognized as authentic by being placed among their muniments.

The case stood over for the opinion of the Court on this point.

*Monday,
14th November.*

MACDONALD, Chief Baron.—This cause has stood over for the Court to deliberate on the admissibility of the two instruments produced by the plaintiff. The objection is that they come out of the hands of a private person, instead of that repository which the law has allotted to such instruments. It was attempted to trace them from that repository, but we do not see sufficient probable testimony of that fact, and can only consider them as coming out of private custody. The present possessor bought them out of another private collection: we can trace them no further.

As the distinctions upon this subject are not very clearly defined, we have consulted with others of the Judges how far the Courts ought to go in admitting such testimony; and we are satisfied that this is an attempt to go further than the Courts ever have gone or ought to go. The instruments come out of the custody of a private person, perfectly unconnected with the matters contained in them. In general an ancient manuscript, the actual execution of which cannot now be otherwise proved, receives authenticity from its being found in that place in which such an instrument ought properly to be. It is true that where a connection can be established, so

as reasonably to account for the custody in which the instruments are found, the Courts have somewhat relaxed the rule; and admitted them to be read though not coming from exactly the most proper repository. In *Miller v. Foster*, I have reason to believe that the Court of King's Bench, in granting a new trial, proceeded upon the ground of the connexion between the terrier and the custody in which it was; and a strong corroborating circumstance in that case was, that the terrier was found annexed to an old lease of the prebend of nearly the same date. But where the custody is merely private and wholly unconnected with the subject-matter, the Courts have never gone the length of admitting such papers in evidence.

In the present case there are considerable circumstances to induce a belief of the authenticity of the instruments produced; the unimpeachable character of the gentleman by whom they are produced, the improbability of any person having had an interest to fabricate them, the appearance of the instruments themselves, and the corroboration given by the induction, which mentions an endowment to have been then lately granted, would probably be sufficient to convince any mind of their authenticity, if they could be received in evidence consistently with the rules of law.

The plaintiff offered in evidence a terrier signed by the vicar and inhabitants; it was found in the registry of the archdeacon of the diocese.

*Thursday,
17th November.*
A terrier found
in the archdeacon's
registry, is
admissible.

Burton objected on behalf of the impropriate rector, (who was also proprietor of the greatest part of the parish,) that this was not admissible as not coming out of the proper repository.

The Court said the terriers were in fact often deposited there, and over-ruled the objection.

A terrier, although not signed by the impropriate rector, nor by any person for him, is evidence against him as to tithes due to him in the parish.

He then objected that the terrier was not evidence as between the rector and vicar in ascertaining the tithes of each. A terrier is an ecclesiastical instrument directed by the bishop to ascertain the glebe lands of the church, and the portions of tithes out of the parish. To that extent it has authenticity as a legal instrument. The tithes in the parish are not regularly included in it. They are indeed in practice always inserted, and the terrier becomes evidence between the vicar and the inhabitants by being signed by both.—As against the rector he contended that it was not admissible on either ground.

He informed the Court, however, that he recollected a case in which the same objection was made in this court while Lord Chief Baron *Skinner* presided in it: the Court were divided in opinion and came to no determination till after his death, when Lord Chief Baron *Eyre* and a majority of the Court being in favor of the testimony, it was admitted.

The Court over-ruled the objection.

The plaintiff proved that he was entitled to some tithes in kind, but a composition having been received by his predecessors for many years, it could not through the negligence of all parties be ascertained what tithes in particular were due to him. *Thursday,
24th November.*

The Court directed an issue to try whether he was endowed of any and what tithes.

WHITCHURCH *v.* WHITING.*Tuesday,
22d November.*

THE affidavit to hold to bail stated that the defendant was indebted to the plaintiff, "as secretary to the Tontine Society," for money had and received "to *his* use."

Dauncey obtained a rule to shew cause why the defendant should not be discharged on filing common bail.

Plumer shewed cause.

By the Court. It is impossible to say from this affidavit in what character the plaintiff sues.

The rule was made absolute.

Same day.

JOHNSON and Others v. ATKINSON and Others.

A tenant cannot file an interpleading bill against his landlord.

Where one claimant seeks a certain rent from the tenant in possession and the other unliquidated damages for use and occupation he cannot make them interplead.

LANCELOT STODHART, by his will, bequeathed certain coal-mines to trustees, for his different relations, in certain proportions. The defendants the trustees leased them to the plaintiffs. The defendants *Atkinson* and his wife received for some time from the plaintiffs, their proportionate share under the will, and gave receipts for it as such; afterwards they set up a claim in opposition to the devise, in right of the wife as heir at law, and commenced an action against the plaintiffs for use and occupation of the premises, considering the lease as void.—The bill prayed that the defendants *Atkinson* and his wife, and the defendants the trustees, might interplead.

The defendants *Atkinson* and his wife demurred.

Plumer and *Hall*, in support of the demurrer, insisted that this was bad as an interpleading bill. The tenant cannot call on his landlord to defend his title, or to interplead with one claiming by adverse title; and either of the parties may demur, where they are improperly called upon to interplead. Besides, these parties claim different things, the one the rent reserved, the other the unliquidated value of the occupation; an interpleader only lies where the same certain sum or thing is demanded by two claimants, and the stake-holder is always obliged

to pay the sum into court; that cannot be done where the sum is uncertain, and the demands different.—They rested on *Dungeyv. Angore*, 2 Vez. jun. 304.; *Smith v. Targett* (*ante*, vol. 2. p. 529.); *Pract. Reg.* 38.

Partridge and King, for the plaintiff.—Admitting the plaintiff not to be entitled to call on his landlord to interplead, yet that is an estoppel that can only be taken advantage of by the landlord himself. The party demurring claims against the title which the estoppel is to protect.

The general rule, that a tenant cannot call on his landlord to interplead, has several exceptions; one is, where a dispute arises between the trustee and a *cestui que trust*; 2 Vez. jun. 312.; that is the case here.—The defendant demurring is *cestui que trust* as to a part; the other defendants are the trustees. Another exception to the rule must be where one holds under a joint demise from tenants in common, each of whom afterwards claims the whole rent upon adverse titles; the tenant is not to be doubly vexed. Then opposing the claim of the heir, the party demurring, either to that of the trustees or of the other *cestui que trust*, it may be brought into court against them by the tenant under the trustees.

The thing which is demanded by both is in substance the same, the rent. The identity of the right claimed creates the necessity of the interpleader, however the quantity of benefit under that right may vary.—Besides, by accepting a portion of the rent

under the lease, the heir has confirmed the demise, and therefore can claim only the rent reserved.

THOMSON, Baron.—The bill does not state as a fact that the heir confirmed the demise ; that is only an inference *arguendo*, from the fact of his receipt of a portion of rent ; how far such a receipt, before being apprised of his real title, would bind him, may be questionable. You state the thing in fact demanded by him to be not the rent, but the unliquidated value of the use and occupation.

Wednesday,
23d November.

MACDONALD, Chief Baron.—There are two objections to the bill ; either of them sufficient to support the demurrer.—The cases cited establish the general rule, that the tenant cannot call on his landlord to interplead with a stranger, which, as to the present suit, the defendant is. The things demanded are also different ; we cannot anticipate the decision whether the heir will be bound by his acceptance of a portion of rent. The things actually demanded are different, and therefore are not the subject of an interpleader.

The demurrer was allowed.

WOOLASTON and Others v. WRIGHT and Others.

Thursday,
4th November.

THE liberty of *Shenton* in *Leicestershire* lies principally, if not wholly in the parish of *Market Bosworth*. It contains about 1400 acres. The plaintiff *Woolaston* was lord of the liberty, and owner of the greater part of it; the other plaintiffs were the tenants occupying his lands there. An immemorial payment had been made by the lord of the liberty to the rector of *Sibson*, in lieu of tithes of some part of the liberty to which he was entitled. There was evidence that the land titheable to the rector of *Sibson* was nineteen yards of land, about a third of the liberty. A money payment having been also made for many years to the rector of *Market Bosworth*, the locality of the lands tithable to each was in process of time forgotten. The rector of *Sibson* claimed his 7*l.* a-year. The plaintiffs admitted his claim. The rector of *Market Bosworth* claimed, and sued for tithes of the whole liberty. The plaintiffs filed this bill praying that the modus of 7*l.* might be established; that the rector of *Market Bosworth* and the rector of *Sibson* might interplead as to the tithes to be covered by the 7*l. modus*; and that a commission might issue to ascertain what lands in the liberty were within the parish or rectory of *Sibson*, and what within the other parish or rectory.

The rector of *Sibson* admitted, that he was only entitled to the *modus* in lieu of the tithes of lands in the liberty due to him.

Newnham, Burton, and Stanley, for the rector of *Market Bosworth*, took the following objections to the bill:

1. That a bill will not lie to establish a *modus* which is not disputed; the rector of *Sibson* claims nothing else.

2. That the two rectors claiming different things, the one tithes in kind, the other a *modus*, could not be called upon to interplead. (See the last case, *Johnson v. Atkinson*.)

3. That the commission could not be granted: (*Atkins v. Hatton*, ante, vol. 2. p. 386.)

4. That the other owners of the lands in the liberty ought to have been parties.

Partridge, Plumer, and Sutton, for the plaintiffs. The rector of *Market Bosworth* claims tithes of the whole liberty. If it is all in his parish we are entitled to sue to establish a money payment to another ecclesiastical person as a discharge against the rector. If it is not in his parish, he has no interest in it, and cannot take the objection. The rector of *Sibson* does not object.

An interpleader lies where two persons claim the same right. The right in dispute is the tithes of a portion of the liberty; when that question is disposed of between the two rectors, the mode of

payment, whether by *modus* or in kind, is a collateral circumstance not essential to the right.

Supposing it to be settled, that a commission cannot issue to settle the boundaries of parishes, for the purpose of tithing, yet the other part of the prayer may stand; we pray a commission to ascertain the boundaries of the parish *or rectory*. The rectory may not be co-extensive with the parish. If this is a portion of tithes of the rectory of *Sibson* in the parish of *Market Bosworth*, (as rather seems to be the case,) a commission to ascertain the boundaries of the rectories can only affect the rights of the tithe-owners, without having any effect on the parochial rights. This will take it out of the case of *Atkins v. Hatton*.

As to the 4th objection, it appears that the *modus* is payable by the owner of the liberty, who is owner of most of the lands; as being the person who pays, the presumption is, that the lands covered by his payment are those which belong to him, stated in the bill. The law will not presume that he is paying for the exemption of other lands than his own.

The *Court* were of opinion for the defendant, on all the objections.

The bill was dismissed (a).

(a) In *Easter Term* following, the cause of *Wright v. Fox* came on to be argued. The plaintiff sued as rector of *Market Bosworth*, for an account of tithe in kind of the lands held by the defendants in *Shenton*. They set up as a defence the payment of 7*l.* a year to the rector of *Sibson*, in lieu of tithes of some part of *Shenton*, and gave evidence from terriers, land-tax

Friday,
25th November.

THOMAS v. EDWARDS.

Vide ante,
vol. 2. p. 558.

DEBT on judgment. It was referred to the Master to compute what was due for the debt and costs. In taking the account, he refused to allow interest on the judgment.

Plumer and *Williams* obtained a rule to shew cause why the matter should not be referred back to the Master, with directions to allow interest.

Dauncey shewed for cause that almost the whole sum due on the judgment was for costs; the allowing interest on which is questionable. 14 *Vin. Abr.* 458. c. 9.; at most it is discretionary in the Court, and that discretion exercised by the former order.

The *Court* were of opinion that the whole debt due on the judgment carries interest.

The rule was made absolute.

assessments, &c. of the nature of the payment. The Court (at the sittings after *Trinity* Term) directed an issue, to try whether the payment of 7*l.* to the rector of *Sibson*, is in lieu of the tithes of all or any part of the defendant's lands in *Shenton*.

The ATTORNEY GENERAL v. DENHAM.

Same day.

THIS was an information for forfeiture of a ship. After two terms having elapsed without trial, a writ of delivery was granted on security, upon affidavit that the vessel was likely to be much injured by lying unemployed. From that time three terms (besides the present) had intervened, without the *Attorney General* proceeding to trial. A rule having been obtained to shew cause why the recognizance should not be discharged, cause was shewn by

The *Attorney General* and *Newnham*. They insisted that the order could not be made, as it would in fact be to nonsuit the Crown; for after delivery of the vessel, if there is no security, the Crown has nothing against which to proceed. They also shewed by affidavits that the witnesses were seamen, and abroad in the public service.

Dauncey, in support of the rule, insisted that, upon waiting three terms after the writ of delivery, he was entitled to this order.

MACDONALD, Chief Baron.—The statute (a) relates only to *goods*, which are always distinguished from the vessel. There is no provision for the delivery of the ship, and it is only by ana-

(a) 13 and 14 C. 2. c. 11, s. 30.

logy that the Court has extended the relief to it. The defendant got his writ of delivery one term sooner than by the general course of the Court he was entitled to it. If it had not been granted till the third term, the *Attorney General* would regularly have had all this term for going to trial. There is no reason why his good nature in granting you an indulgence for the preservation of the vessel should have the additional effect of abridging his time of suing.

There is not any precise definite time, after the granting the writ of delivery, within which the prosecutor must proceed. By the course of the Court, after three terms have elapsed, a writ of delivery is granted on security; by analogy, the same period is in general allowed after the writ of delivery. If the prosecutor does not go to trial within that time, the Court expects to hear a reason assigned for the further delay. The reason here given appears very satisfactory. The witnesses are seamen, and abroad.

The rule was discharged.

LONGMAN and Others v. CALLIFORD.

Same day.

THE defendant obtained an order to dismiss the bill for want of prosecution, unless cause; to retain it, the plaintiff filed a replication.

Hart now moved to be at liberty to withdraw the replication, and amend the bill, on shewing the materiality of the amendments. He relied on 1 *Fowler's Pract. of Exchequer* 128. to shew that he was regular.

Romilly, on the other side, objected that the plaintiff ought also to shew why the matter to be introduced by the amendment might not have been stated before. The rules of the Court to prevent vexatious delays of the plaintiff would be nugatory, if by intentionally omitting a material part of his case at first, he might of course obtain further time, when his delay has already entitled the defendant to have the bill dismissed.

The *Court* were of that opinion, and

Refused the order.

Monday,
28th November.

GOLDSMITH v. Lord SEFTON.

THE plaintiff, a sheriff's officer, had arrested Colonel *M.*, who immediately escaped into the defendant's house. The defendant coming home soon after found the plaintiff there, watching Colonel *M.*, who however contrived to make his escape out of the house. The plaintiff some time after retired to an alehouse in the neighbourhood. Lord *Sefton*, being in the mean time informed of the cause of the plaintiff's having forced into his house, followed him, and demanded to see his warrant. This was at first refused, some altercation took place, and Lord *Sefton* held out his horsewhip in an attitude of menace to the defendant; he opposed his stick, which Lord *Sefton* took out of his hand and threw away. For this assault the action was brought. Upon judgment by default, the jury on the writ of inquiry gave 200*l.* damages.

A rule having been obtained why the writ of inquiry should not be set aside.

Sellon shewed cause. He insisted that the Court could not interpose in the ground of excessive damages in matters of tort. *Spong v. Hog*, 2 *Bl. R.* 802. 1 *Mod.* 232. *Redshaw v. Brooke*, 2 *Wils.* 405. *Fabrigas v. Mostyn*, 2 *Bl. Rep.* 929. *Benson v. Sir Thomas Frederick*, 3 *Burr.* 1845. *Duberley v. Gunning*, 4 *Term Rep.* 651. An officer is peculiarly protected in the execution of the process of the

courts, and that protection extends to him while returning from the execution of his duty. *Fort. R.* 308.

Plumer and *Lowndes*, for the defendant contended that the Court have authority to set aside a verdict where it is clearly unjust. In cases of tort that does not frequently occur, because it is difficult to find a criterion by which the Court can compute the damages. Where the sum is clearly oppressive, all the cases recognize the power of the Court, and in several it has been acted upon. *Sharpe v. Brice*, 2 *Bl. Rep.* 942. *Jones v. Sparrow*, 5 *Term Rep.* 257. (a)

MACDONALD, Chief Baron.—I can have no doubt that the power of the Court extends to granting a new trial in all cases; the distinction arises only from the difficulty in some of exercising this authority. In matters of contract, the Court have, in general, a certain principle, by which they can determine whether the verdict is proportioned to the injury or not. In matters of tort this is more difficult, and therefore the Courts never interpose to set aside a verdict, except upon a “glaring case of outrageous “damages,” as is observed by the Lord Ch. J., afterwards Lord *Camden*, in *Huckle v. Money*, 2 *Wils.* 207. In *Jones v. Sparrow* the injury was much more serious than here, the damages not so great, yet the verdict was set aside. In most of the cases where it has been refused, the Court have said that they were not dissatisfied with the verdict, or at least

(a) Many cases upon this subject are collected in the case of *Duberley v. Gunning*, 4 *Term Rep.* 651. and in the note subjoined.

there have been circumstances to warrant damages to nearly the extent given. In *Duberley v. Gunning*, the new trial was refused by a majority of the Judges, on the ground that the nature of the injury, criminal conversation, rendered impossible all computation of the value of the satisfaction.

By the whole current of authorities, it appears that we are bound to protect a party where, by the improper warmth or worse passions of a jury, damages glaringly and outrageously great have been given against him. We cannot say what the damages ought to be, but can only send it for the investigation of another jury.

HOTHAM, Baron.—It is as much the duty of the Court to protect the party from injustice of the jury, as to submit to their finding in those things which are exclusively within their province. The present verdict is such as cannot be justified. It is an insult on the judgment of the Court to suppose it a fair verdict.

THOMSON, Baron.—The practice of the Courts certainly has been to proceed with great caution in interfering with the quantity of damages given in cases of tort. In *Gilbert v. Burtonshaw*, *Cowp.* 231. Lord *Mansfield* says “Unless it appears that the damages are flagrantly outrageous and extravagant, “it is difficult for the Court to draw the line;” and so in *Ducker v. Wood*, in 1 *Term Rep.* 277. But where the damages are of that description, the Courts have interfered.—In addition to the cases cited, I will mention one in the Common Pleas, *Easter*

27 *Geo.* 3., where upon a writ of inquiry for an assault, 200*l.* damages were given and set aside as excessive. The present seems a perfectly proper case for the interference of the Court.

The rule was made absolute.

The KING *v.* CHAPMAN and another.

THE *sci. fa.* stated, that *Chapman* and *Lea* (the defendants) together with one *Collins*, by their bond, under their seals, became jointly and severally bound to the crown in 200*l.* It therefore commanded the sheriff to give notice to *Chapman* and *Lea*, "that they severally be and appear," &c. to shew cause, if they can, why we should not have execution against them, &c.

The defendants prayed *oyer* of the bond and condition. It was a bond given under 19 *Geo.* 3. *c.* 56. by *Chapman*, as an auctioneer, and *Lea* and *Collins* as his sureties; conditioned that he should, within twenty-eight days after each and every sale by auction, deliver to the persons appointed to receive the same, an exact and particular account, in writing, of the total amount of the money bid at every such sale, and of the several articles, lots, &c. and the prices, &c.

The defendants pleaded that the defendant *Chapman* did, within twenty-eight days after each and every sale by auction, deliver such account, &c.

Replication, that the defendant *Chapman*, using and exercising the said trade or business of an auctioneer, &c. did on the 3d September 1795 sell by auction in divers lots, to divers persons, and for divers sums of money, &c. divers goods, to wit, books in quires, copies, and bound books, as the property of Mr. *John Deighton*, at which sale divers sums of money were bid, and the sum of £. became due to his Majesty for duties, and the defendant *Chapman* did not within twenty-eight days, as required by the said bond, after the sale of the said goods and chattels so sold by auction as aforesaid, deliver to the person appointed to receive the same an exact and particular account, &c.

Rejoinder, that before the supposed sale, *J. Deighton* having sent distinct and individual invitations to certain persons of his acquaintance, to dine with him at a tavern called the *King's Head Tavern*, proposed to the persons assembled in consequence of such invitations, to bargain with them respectively for the sale amongst them, by private contract, of divers books, copies, and bound books, and did then and there accordingly bargain for and sell amongst them by private contract a great part of such books; and that afterwards certain small parcels thereof remaining uncontracted for and undisposed of by the said *J. Deighton*, were then and there at the request of the said *J. Deighton* offered to sale, and sold by the defendant *Chapman*, being one of the persons so in-

vited and then present in consequence of such invitation, to the highest bidder; but defendant says that the said sale, being the same supposed sale in the replication mentioned, was not an open or public auction, nor was any person admitted to the same who had not been so invited by the said *J. Deighton* as aforesaid, and that no deposit or other money was paid to *Deighton* or the defendant *Chapman*, or for their or either of their use, nor was any deposit or other money required to be so paid, in respect of any of the books so contracted for or sold as aforesaid, either at the time of the said sale, or at any time since.

To this rejoinder the *Attorney General* demurred.

Wood, for the crown, argued, that the case fell within the words and intent of the Legislature. By the 17 *Geo. 3. c. 50. s. 5. &c.* the duty was first imposed in loose and indefinite terms "on sales at auction."—The 19 *Geo. 3. c. 56.* is made to explain that act, and *s. 3.* defines what shall be considered as a selling by auction so as to incur the duty. "Any sale of any estate, goods, or effects whatsoever, by outcry, knocking down of hammer, by candle, by lot, by parcel, or by any other mode of sale at auction, or whereby the highest bidder is deemed to be the purchaser," and any person who shall sell any goods "by public sale, or otherwise by way of auction," without a licence, is liable to a penalty. The act having thus defined in *sect. 3.* what shall be taken to be a sale at auction, *viz.* a public sale or otherwise, proceeds upon that definition in the subsequent clauses, *s. 4, 5, 6.*—So

in s. 7. upon which this prosecution is founded, the words must be understood to have reference to this leading description of the nature of the transaction, to be affected by the act; a bond is required from every person acting as an auctioneer at any *public sale or auction*, to give notice within twenty-eight days after *each and every sale by way of auction*. The latter words are not confined, and must have reference to the general meaning of the act, including all sales, public or otherwise, by way of auction. Even the former words may admit the same construction as if they stood thus, "by public sale or by auction," the word auction being already explained to comprehend private as well as public sales by auction.

But supposing that construction not to hold, these words only narrow the description of persons liable to give such bond, exempting all those who do not sell at public auctions: the defendant actually has given his bond, and therefore it is immaterial whether he was compellable so to do, and the condition of it is to give notice of all sales, whether public or otherwise.

There is no absurdity in supposing that those who act as auctioneers at public sales shall not be permitted to sell privately by auction without paying the duties.

If a contrary construction is put upon the act, great danger must arise to the revenue, as the vendor has all advantages of a sale by auction without paying the tax. If this case is protected, it is manifest that by the simple expedient of giving a

particular invitation to each individual who attends a sale by auction, every such sale may equally with the present be exempted from the duties imposed by the statute.

Marryatt for the defendant.—The Court are bound to take the fact upon this record to be, that when a party of acquaintances were assembled, some goods were sold by private contract among them, the remainder by auction; that it was a fair and *bonâ fide* transaction, without any intention to defraud the revenue, that not being suggested by the crown. This is a mere private transaction, upon which it never could be the intention of the Legislature to attach. It must equally extend to every transaction, where two persons bid against each other, and the thing is sold to the highest bidder. Such a sale must equally with this be subject to the duty, and the vendor will be liable to the penalties, if he has not taken out a licence, given a bond to the crown, and given notice, and a catalogue of the sale and notice of the price for which it was sold. The act cautiously avoids that absurdity; in almost every clause it expressly confines itself to public sales; s. 3. after defining a sale by auction, proceeds to impose a penalty on those who shall, without a proper licence, sell goods by *public* sale by way of auction, *as aforesaid*; this carries back the word *public*, as applicable to the whole preceding description of sales liable to the duty. S. 7. expressly takes the same distinction. It applies only to those acting as auctioneers at “any public sale or auction;” in the subsequent words of the clause, the word *public* is omitted, but that must be understood merely as saving useless repetition.

CASES IN THE EXCHEQUER,

the whole is *in pari materia*: and if the Legislature meant to make a distinction, it ought to have done so by express words; otherwise the act must be taken throughout to relate to the same sort of transactions, public auctions. S. 8. shews that the act only related to those public sales where an auctioneer is employed, where catalogues are made out, and public notice previously given. But where, by not making it public, the advantage of competition is not obtained, the duty does not attach. The present appears upon the record to have been an unpremeditated sale of those articles which happened not to be sold by private contract, where neither two days previous notice of any intended sale could be given, nor a catalogue made out.

He also objected to the form of the proceeding, as being a joint *scire facias* against two on a bond of three. It is determined in the case of *the King v. Young* (a), that such proceeding on a recognizance is bad.—A distinction is there taken between a recognizance and a bond, that the latter may not have been executed by the third, and therefore a plea in abatement is necessary to introduce that fact on the record; but this being a bond to the crown, is of record as executed by all the obligors, and is the same as a recognizance; besides, it is averred in the declaration to have been sealed by all the three obligors.

Wood, in reply, insisted, that the objection to suing two out of three obligors could only be taken by plea in abatement, stating the third obligor to be still alive. In *Sayer v. Chaytor*, 1 *Lutw.* 696. it is

(a) *Ante*, vol. 2. p. 448.

held, that in an action on a bond against two of the obligors, a plea in abatement, not averring the co-obligor to be alive, is bad ; that fact therefore must appear upon the record, which is not the case here. In *Horner v. Moor*, cited in 5 *Burr.* the fact of both having signed, and both being still alive, appeared upon the declaration, and the judgment of the Court is stated to have proceeded upon the circumstance of its so appearing on the face of the declaration. *Blackwell v. Ashton*, in *Aleyn* 21. on which the Court founded their judgment, in the *King v. Young*, is a very loose note, and the case in *Style* 50. is very differently reported (a).

But supposing the rule well founded, that where it appears by the declaration that all have executed, and two are jointly sued, it is bad, that will not apply to the present case. This is not a joint suit against the two defendants, but several against each. The words of the *scire facias* are, "that they *severally* be and appear to shew cause," that is, *severally* to shew cause. This distinguishes it from the case of the *King v. Young*, where the words of the *sci. fa.* were "that they be and appear," &c. which must be intended that they jointly be and appear.

A joint and several bond or recognizance to the crown has the effect of a joint judgment against all, and a several judgment against each ; of course the crown has the option to take out execution or a *scire facias* against all or against each. And if the

(a) That appears to be the report of a different question between the same parties. It is in the term preceding the case in *Aleyn*.

scire facias is against all, yet the execution upon it may be several, for it is a *scire facias* to obtain execution, according to the form of the judgment, which is joint and several. *Gee et ux v. Sir F. Fane*, 1 *Lev.* 225. and 1 *Sid.* 339. *Cornish v. Clarke*, 8 *Mod.* 199. *Williams v. Green*, 8 *Mod.* 296. *Fenshaw v. Morrison*, 6 *Mod.* 197. Then if the *scire facias* had been against all three, that they severally shew cause, there might have been several executions upon it; but if the *scire facias* was considered as a proceeding against all jointly, the execution must be joint; it is therefore a several proceeding, and equally good against two as against all or one. The circumstance of one writ being issued for both, is immaterial. When the nature of the proceeding appears to be several, the effect of joining two or more in one writ depends upon the practice of the Court; and the officers all agree, that the practice now followed has always prevailed (a). The expediency of such a practice is manifest, as the expence of another suit is saved, by including in one *scire facias* all those defendants who live in the same county.

Marryatt.—The reason why, in a plea in abatement, it is requisite to set forth that the co-obligor is alive, is this; because the fact of his having executed not appearing on the declaration, but being introduced as a defence, that defence must be complete; but where it appears by the plaintiff's own shewing, that there was a co-obligor not sued, the presumption is, that that co-obligor is still alive, unless the

(a) The same practice was certified in the case of the *King v. Young*, *vide ante*, p. 451.

plaintiff will rebut the presumption he himself has raised, by shewing that he is dead. The case of *Horner v. Moore* must be a mistake; for it is impossible to believe that the fact of the co-obligor being alive could appear on the face of the declaration.

The issuing one *scire facias* against two, who are thereupon to come in and plead one joint plea, and to have one judgment as to both, seems inconsistent with the idea of a several suit. The practice of the office cannot control the law; and in point of expediency, it would be a much greater saving to issue a joint *scire facias* against all, and have a *testatum scire facias* against those who live in a different county from that to which the first issued, upon *nulla bona* returned to it.

The Lord Chief Baron said, that upon looking into this case, the Court did not see any sufficient ground of distinction between it and the case of the *King v. Young*. Monday,
28th November.

Judgment for the defendant.

SITTINGS AFTER MICHAELMAS TERM.

Serjeant's Inn
Hull.
Monday,
11th *December.*

The ATTORNEY GENERAL *v.* BOLTON.

THIS was an information for a charity.—The testator in 1716 devised certain estates to the ancestor of the defendant, charged with an annuity of 16*l.* a-year as a salary for a clergyman, to be appointed by the devisee, to reside in the village of *A.* to preach a sermon every *Sunday* in the chapel there, and to teach six poor children to read and write. The informant, the vicar of the parish in which the village and chapel of *A.* were situated, insisted that as no person could be admitted to preach in the chapel without his licence, (which he had refused to grant,) and as he had performed that duty, he was entitled to the salary.

Upon the hearing, this claim was abandoned.

The defendant in his answer, said, that he was desirous of executing the trust, but was prevented by the relator's refusing to permit the person he should appoint to officiate in the chapel.

Scafe, for the defendant, argued that the devisee being only liable to pay the salary to a person answering the description of the charity, held the lands discharged during such time as without his default there was no person to receive it; that therefore there would be no demand for the arrears. He also pressed, that the relator having prayed improper relief, and shaped the whole information with a view to his own demand, which could not be maintained, he ought to pay costs.

Richards for the information.

The Court clearly held that the defendant ought to account for the arrears of the annuity, and directed the Deputy Rembrancer to receive proposals for the direction of the charity; they said that as directions were to be given, so that the information had a foundation, the relator should not pay costs.

PENRICE and Others *v.* GARNONS.

Wednesday,
13th December.

RICHARD SMITH, seized of certain freehold lands, and also possessed of the leasehold premises in question, under a lease from one of the prebendaries of the church of *Hereford*, by his will in 1768 devised as follows. "Also I give, devise, and bequeath all and singular my messuages, lands, tenements, and hereditaments, as

“ well freehold and leasehold as of any other
 “ tenure whatsoever, situate, lying, and being in
 “ the parishes of *St. M.*, *St. O.*, and *St. J.* in the
 “ city of *Hereford*, and the parish of *P.* in the
 “ county of *Hereford*, unto my dear and loving
 “ wife, her heirs, executors, administrators, and
 “ assigns; but nevertheless my will and meaning is,
 “ and I do hereby order and direct, that if my said
 “ wife should happen to die without leaving issue
 “ of her body lawfully to be begotten living at her
 “ decease, and if my brother-in-law *William Garnons*,
 “ his heirs, executors, administrators, or assigns, do
 “ or shall within twelve calendar months next after
 “ such her death well and truly pay or cause to be
 “ paid unto such person or persons as my said wife
 “ shall by any deed or writing, or by her last will
 “ and testament in writing, duly executed in the
 “ presence of two or more credible witnesses,
 “ direct or appoint, or for want of such appointment,
 “ then unto her executors or administrators, the
 “ sum of 2000*l.* of good and lawful money of *Great*
 “ *Britain*, with interest to be computed from her
 “ death; that then and in such case, all and sin-
 “ gular my said messuages, &c. shall immediately
 “ thereupon go and remain, be granted, conveyed,
 “ and assigned unto my said brother-in-law *W.*
 “ *Garnons*, his heirs, executors, administrators,
 “ and assigns; any thing hereinbefore to the con-
 “ trary in any wise notwithstanding.”

And he appointed his said wife sole executrix and
 residuary legatee.—After making this will, the tes-
 tator surrendered the lease under which he then
 held the premises in question, and took new leases
 from the prebendary. He died in 1774.

Elizabeth Smith his widow died in 1791, leaving a will to this effect: it recited the devise and power of appointment in her husband's will, and witnessed that she did, "in pursuance of the power given and reserved to her in and by the said will, direct and appoint the said sum of 2000*l.* to be paid to the plaintiffs, and she gave and devised the said messuages, lands, tenements, and hereditaments so given to her by her said husband's will as aforesaid, and all her legal estate and interest therein," to the plaintiffs, in trust to convey the same to the defendant *Garnons*, upon payment of the said sum of 2000*l.* "according to the true intent and meaning of her said late husband's will, but not before or otherwise."

The plaintiffs in 1791, not long after the decease of *Elizabeth Smith*, conveyed the freehold and leasehold premises, which had been the subject of these devises, to the defendant, according to the directions in the wills of *Richard* and *Elizabeth Smith*, on his paying them the sum of 2000*l.* above mentioned; the deed of conveyance reciting it to be in execution of that trust.—The defendant afterwards conveyed them to other persons.—The price of the leasehold part obtained on this conveyance was 2400*l.* The value of the freehold did not appear.

The bill charged that the conveyance by the plaintiffs to the defendant was made upon a mistaken belief of their being obliged by the devises of *Richard Smith* and *Elizabeth Smith* to make the same, and therefore prayed that he might be decreed to ac-

necessary distinction upon the general principles. A devise of personalty, being a subject constantly fluctuating, extends to the personalty possessed at the time of the testator's death. A devise of a piece of plate or of a particular lease, is necessarily adeemed by the surrender or alienation of the specific thing bequeathed; but a bequest of all my household furniture, or of all my leasehold property, applies to all that species of property enjoyed by the testator at his death. A general bequest of all chattels carries future leaseholds; is it possible that an express bequest of all leaseholds shall have a narrower construction? This distinction is expressly recognized in all the cases. *Wind v. Jekyl*, 1 *P. W.* 575. *Abney v. Miller* is decided, on the ground of being a devise of the particular term. The same rule is followed in *Carte v. Carte*, 3 *Atk.* 175. in *Stirling v. Lydiard*, 3 *Atk.* 199. upon a bequest of "all my leasehold estate." A church lease renewed afterwards, was yet held to pass; that is precisely the present case. *Rudstone v. Anderson*, was determined on the ground of being a specific bequest of the tithes held under the former lease. This admits the rule, whether it may be a proper application of it or not. Lord *Thurlow*, in *Hone v. Medcraft*, proceeds on the same principle of its being a specific bequest.

At all events the will of Mrs. *Smith* will carry this interest. We are not to suppose her ignorant of the law. She may have had advice, and may have entertained a doubt whether this passed by the will of her husband according to his manifest intention. The fulfilling his purpose was not an improbable intention of her will. The last words of her will

“ according to the true intent and meaning of my “ late husband’s will,” do not necessarily imply that she considered that as the legal import of it. She gives, not only all the freehold and leasehold “ given to her as *aforesaid*,” under the specific bequest, but also “ all her legal estate and interest “ therein.”—This must mean a right different from that under the specific bequest; and includes her claim as residuary legatee.

The defendant stands not merely in the character of a devisee, but in that of a purchaser.—The Court cannot say whether he would have bought the freehold at all, if the leasehold had not been included. The plaintiffs have made this bargain with him, with full knowledge of all the facts, and are therefore bound by this conveyance.—The bill is also improper in praying merely a return of the price. They should offer to return the 2000*l.*, or at least a part of it proportioned to the value of the leasehold compared with the freehold estate.

MACDONALD, Chief Baron.—This case arises upon the construction of the two wills, of Mr. *Smith* and of his widow Mrs. *Smith*. Upon the first of these wills a question is raised, whether the renewal of the lease of the land devised, operated as a revocation of the bequest. The Court do not feel it necessary to handle this question, as the rights of the parties are settled by the will of Mrs. *Smith* in a manner too clear to admit of a doubt. Assuming then, for the purpose of this discussion, that the property did not pass under the husband’s will, I shall consider how that of the wife operates.

She certainly took this property either under the general absolute bequest, or under the specific limited devise. The intention of her husband is also perfectly clear. She has adopted this intention, and has directed a conveyance according to it, as the fair and honest duty of her situation required. She has by the broadest and most unequivocal words put herself in the place of the original testator, and fulfilled the purposes of his will, without leaving any mark of her having considered whether she was bound by that will or not. This is evidently the intention of her will. She recites his will, and professes to be acting under it, for the purpose of fulfilling his views. The sum charged and the terms and time of payment are adhered to; and she has studiously conveyed "all her right and "interest" to go "according to the true intent "and meaning of her said late husband's will."

But it is argued that the words "given to me by "the said will as aforesaid," narrow her bequest to a mere transmission of the interest conveyed under the particular bequest of the husband there referred to; but these words are merely intended as a description of the subjects she means to devise: it is plain that that particular bequest of the husband either did give or meant to give the premises in dispute, and in either case her reference to that clause, as descriptive of the subjects of her bequest, will carry every thing meant to be included in the clause so referred to.

It would be too much therefore for us to say that she acted upon ignorance of her own claims in

making this devise. It is at least as probable that she was led by a very honourable desire of fulfilling her husband's real intention, whether bound in law to comply with it or not. But at any rate what she has done is perfectly clear. She certainly had a full power of making this devise. She has adopted the intention of transmitting the whole estate to the relations of her husband, and has used words fully sufficient to effectuate this purpose.

These plaintiffs come into court in very unfavourable circumstances. They allowed the defendant to retain this property undisputed for four years. Even if their case had been good, this delay, arising from their negligence in not sooner claiming their right, would have been highly reprehensible. They at last came here to pray what would at all events have been impossible to be decreed. They ask a return of the value of the estate, without shewing us what is the value of the other property come to the defendant, without offering to return him the money he has paid, or any proportion of it. Coming with so lame a case to disturb a title so long quiet, and with a prayer so informal and improper, they must pay the costs.

TURNER v. WILLIAMS.

Same day.

THIS was a bill for tithes of the agistment of barren and unprofitable cattle. The defendant in his answer said nothing as to sheep, and his depositions also went only to other cattle depastured. The

plaintiff proved that sheep had been agisted on the farm.

Burton and Thompson objected, that by this loose mode of laying the demand, the defendant was entrapped into a belief that only great cattle were inquired after, and had directed his attention to them only. Although sheep are properly cattle, yet in common language they are seldom meant to be included in that general term. In suits for tithe of agistment, it is the universal practice to demand it for sheep expressly, and there is a good reason for it. Sheep are not supposed to be barren and unprofitable cattle; they always yield either lambs or at least wool; agistment tithe can only be due where they are sold out of the parish before shearing time, so as to become unprofitable.

Plumer and Richards on the other side.

The Court thought the defendant misled by the loose mode of laying the demand, and refused to direct an account as to the agistment of sheep.—There being contradictory evidence as to agistment of other cattle, an issue was directed.

PULLEN *v.* CRESY.

JOHN STEIGLER, by his will in 1773, gaveto each of the children of his brother-in-law *John Cresy*, that should be alive at the testator's death,

50*l.* to be paid to their father for their use. The said legacies were accordingly paid by the executor to the said *John Cresy*, for the use of his children living at the time of the death of the testator. *John Cresy*, by his will in 1787, gave to each of his children 260*l.* to be paid to them by his executors, at their respective ages of twenty-one years; and if any of his sons or daughters died before they attained the age of twenty-one years, that then the surviving children should enjoy the part or legacy bequeathed to the deceased child, in equal proportions; and appointed the defendants (one of whom was his eldest son) his executors. The question raised by the answer was, Whether the legacies given by the father were not in satisfaction of the legacies given by the will of *J. Steigler*?

King for the plaintiffs, the younger children. A legacy is not in general considered as satisfaction of a precedent debt, unless the testator shew that to have been his intention. *Meredith v. Wyn*, *Prec. in Ch.* 312. *Crompton v. Sale*, 2 *P. Wms.* 553. *Field v. Mostyn*, before Lord Bathurst, March 1778. (a) *Baugh v. Reed*, 3 *Bro. R.* 192. The legacy given by the father is not payable immediately, and cannot therefore be considered as a satisfaction, *Clarke v. Sewell*, 3 *Atk.* 98. *Nichols v. Judson*, 2 *Atk.* 300. Another objection is, that the legacies given by the

(a) *Field v. Mostyn*. The cause coming on for further directions, it appeared that the testatrix owed Mrs. *Hutchinson* 100*l.* and left her a legacy of 500*l.*; both the debts and legacies were charged by the will on a real estate on deficiency of personalty. The Lord Chancellor decreed that both the debt and the legacy should be paid to Mrs. *Hutchinson*.

father are contingent, those from the uncle were certain. *Crompton v. Sale. Barrett v. Beckford*, 1 Vez. 519.

Richards, for the defendants, contended that the legacies of the father were asatisfaction of the other legacies. In construing a will, the intention of the testator is the only question. The legacies of the uncle were to be paid to the father *for the use* of the plaintiffs; the father did apply that money *to their use*. He maintained them for above fourteen years after the death of their uncle, at a much greater expence than their legacies amounted to. Perhaps this Court would not have admitted that a sufficient account of the money received by him, because a father is bound to maintain his children, and cannot apply a legacy left to them to exonerate himself; but this is a mistake so very general, and so natural, that the Court must admit it as a probable circumstance operating on the testator's mind. By giving a legacy to a creditor, it is always a doubtful question of intention whether it was meant in satisfaction or not: that intention is to be gathered from all the circumstances, and the most material is the conduct and situation of the testator himself; from which it appears that he considered himself as owing nothing, and therefore meant the legacy of 260*l.* as the only sum to be received by the plaintiffs.

The Court held that both the legacies should be paid; as no express intention is proved, it must be collected from all the circumstances. The presumption of the father having imagined that he had discharged the debt, cannot weigh against the other circumstances which have often been recognized as

marks of intention, the latter legacy being subject to a contingency, and payable at a future time.

They accordingly decreed an account of the legacy of 50*l.* together with interest and costs.

ANSTIE and Others *v.* MASON and Others.

Friday,
15th December.

THE defendant Mrs. *Fellows* was entitled to 500*l.* legacy under her father's will. She was married *de facto* to *Fellows*, (since dead,) but he having another wife alive, that marriage was void. *Fellows* being much indebted to several of the plaintiffs, prevailed on the defendant Mrs. *Fellows* to join with him in an assignment of this legacy to the plaintiff *Anstie*, in trust to secure the demands of the other plaintiffs.--The plaintiffs knew at the time of this assignment that the marriage was void. Whether Mrs. *Fellows* knew that fact or not was much disputed upon the evidence. In the assignment she was described as the wife of *Fellows*.

Burton and *Woodeson*, for the plaintiffs, insisted that she did this knowing herself to be a feme sole, and therefore was bound.

Johnson and *Hall*, on the other side, argued upon the evidence, that she did not believe the story of

her husband's former marriage; and that all parties had bound themselves by their signatures to the deed of assignment, to admit that she executed it only in the character by which she is there described. If she had really been the wife of *Fellows*, her executing the deed could not pass any thing more than the assignment of the husband had already given. If she executes it as his wife, and they accept her assignment as such, they must allow her all the benefit of that character. But the assignees of a legacy to the wife stand only in the place of the husband, and are compellable in equity, as he would have been, to make a settlement on the wife before obtaining here the benefit of the legacy.

MACDONALD, Chief Baron.—If ever there was a case in which the Court would be inclined to assist a party, it is the present. The defendant Mrs. *Fellows* is already the greatest sufferer by the villany of this man who pretended to marry her. From the moment of the marriage, he began to plunder her of all her property, and the last hand was put to it by this transaction. Upon the facts disclosed, we cannot entertain a doubt that Mrs. *Fellows* was fully apprized of her situation. If there was any doubt of it in her mind, that is the utmost that can be said. She seems to have resolved on complying with this request, in the execution of the assignment, whether she was in truth his wife or not. Then it is quite immaterial what she may choose to call herself in the deed. If she knew herself to be a feme sole, she is bound, however described in this instrument. The

plaintiffs are creditors, and entitled to the full benefit of the security they have obtained.

The other Barons were of the same opinion.

Decree for the plaintiffs.

BALDWIN v. MALO.

*Saturday,
17th December.*

THE plaintiff filed a bill in Chancery for the same matters as here, and after answer dismissed it.

Richards moved that he should pay the costs of that suit before being allowed to proceed here.— He compared it to two ejectments in different courts of law.

The order was granted.

JENKINSON v. SIR LUCAS PEPYS, Bart.

Same day.

PLUMER and *Johnson* moved for leave to examine witness before the examiner, after publication, who had been sworn before publication

passed, and all the interrogatories then given in ; there was an affidavit that the agents for the defendant had not seen the depositions on the other side, which had been delivered out.

Steele, on the other side.

It appeared that the practice in the examiner's office had been to examine at any subsequent time all the witnesses who had been sworn before publication.

The Court declared such a practice extremely improper, and desired that it might be understood that they would not in future allow it ; but as the present party had trusted to the practice actually existing in the office, they thought he ought not to suffer.—They therefore

Granted the order.

Same day.

In the Matter of J. HARRISON, an Infant.

A mortgagee in fee devised to A., B., and C., and the "survivor, and the heirs of such survivor." The infant heir of the testator was directed to join in reconveying to the mortgagor, as having the fee in him during the joint lives of the devisees.

YOUNG and his wife mortgaged the lands in question to the father of the infant in fee ; he died, leaving the infant his heir at law ; and hav-

ing by his will devised his property, real and personal, to three trustees, "and the survivor or " survivors of them, and the heirs, executors, " and administrators of such survivor," for certain trusts(a). The mortgagors wishing to redeem, petitioned the Court, who referred it to the Deputy Remembrancer to inquire whether the infant was a mortgagee within the meaning of the act 7 Anne. He reported that he was.

Short, on behalf of the mortgagors, moved to confirm the report, and that the infant might be directed to join in the conveyance, on payment of the mortgage money to the trustees.—He considered the fee as having descended upon the infant heir, until, by the death of two of the trustees, the contingent remainder in fee to the survivor should take effect. He referred to *Vick v. Edwards*, 3 P. W. 372. Co. Litt. 191, a. and Mr. Butler's note, *ibid.* (n. 1.) *Fearne on Contingent Remainders* 513, 521, &c. (edit. 1791), and the cases there cited.

The Court, after much consideration, confirmed the report, and directed the infant to join in the conveyance.

(a) It was not a trust to sell, nor any which by necessary implication carried a fee to the trustees.—See Mr. *Fearne's* observations on the case of *Vick* and *Edwards*.

*Same day.*WOOD *v.* WRAY and Others.

THE plaintiff, lessee of the rectory of *Aysgarth* in *Yorkshire*, under *Trinity College, Cambridge*, sued for several species of tithes, more especially agistment tithes. Two of the defendants, *Wray* and *Chapman*, answered jointly, setting up moduses to cover hay and agistment tithes. *Chapman* said he held as owner "certain lands within the township of *T.* consisting of 20 acres, or thereabouts, and also of seven beast-gates or cattle-gates in certain open pastures there called *A.* and *B.*, together with common of pasture on the moors or commons within the township; and which said farm, lands, or grounds are part of an antient estate within the said township which heretofore belonged to *J. C.*; the other part whereof consists of eleven acres of meadow land, or thereabouts, and three beast-gates, or cattle-gates; and which said last mentioned premises also belong to the said defendant, but during the said years were let out to tenants." The answer then set forth that the said defendant held as owner "certain other lands there, consisting of 27 acres, or thereabouts, which were parcel of an antient estate within the said township which theretofore belonged to *W. A.*, and the other part of which consisted of 28 acres, or thereabouts."—The description of the lands held by the defendant *Wray* was similar, being parcel of another ancient estate.—They then set forth certain moduses payable for these ancient estates respectively. There

was evidence to shew the extent and boundaries of the several antient estates.

Burton, Hollist, and Bell, for the plaintiff, objected that the description of the places covered by the moduses, was not sufficiently certain.—The antient farms ought to have been set out by metes and bounds. Here even the name of each antient farm is not given, nor the names of the owners or occupiers of the other parcels not held by these defendants.

Partridge, Campbell, and Topham, on the other side, insisted that the description was sufficient in an answer where only the general nature of the defence is necessary to be set forth. The evidence supports that defence, and makes out the particular description required.

MACDONALD, Chief Baron.—The question submitted to the Court is, Whether the answer of the defendants has defined, with reasonable precision, the antient estates in respect of which their several moduses are claimed? They have not given any description of the particular closes held by them, otherwise than as lands of certain extent; they do not name the parcels, nor describe their boundaries. It is impossible therefore, upon this answer, to say which are the lands ascribed by them to each ancient estate, and covered by the modus attaching upon it. The description of the antient estates, of which these lands are supposed to be parcel, is equally indefinite. They are not named nor described by boundaries, or even by the names of the tenants of the other portions of those estates.

All we know of them is, that they lie in some part of the township of *T.* ; but there is no clue to lead us to discover their particular locality.—It is very true that in an answer considerable indulgence is shewn in the setting forth the defence, and the evidence here makes the case more intelligible; but the defendant is not to lie by in his answer, and give a blind description, which the plaintiff cannot meet. There must be such reasonable precision in the description, as would enable a sheriff to give possession of the closes. Would this description be sufficient for that purpose? No issue could be directed upon this defence. The issue is in general in the words or nearly in the words of the answer; but here there is no description at all of the place covered by the *modus*. There is nothing therefore to try by an issue. Where there is an inaccuracy in the answer in describing the defence, an indorsement on the *postea* may remedy the error: here the description is totally wanting; an indorsement therefore could not assist the case(*a*).

The defendants were decreed to account.

(*a*) See *Clarke v. Orde*, *ante*, p. 639.

CHAYTOR and Others v. TRINITY COLLEGE, *Same day.*
CAMBRIDGE, and WOOD.

WOOD the lessee of the College having sued for One owner of lands in a township may sue for himself and the others to establish a contributory modus for all the lands there. agistment tithe, this bill was to establish a modus. The plaintiffs filed it as owners and occupiers of lands within the township or district of *Thoresby* in the parish of *Aysgarth*, on behalf of themselves and the other owners and occupiers of lands in the said township, to establish a contributory payment of 6s. 8d. in lieu of all tithes of hay and agistment in the township. It appeared, in fact, that the whole township belonged to the plaintiff *Chaytor*, except two pieces which belonged to persons not parties.

Burton, *Hollist*, and *Bell* objected that this not being a parochial modus, but merely for a particular district, could not be supported by one for himself and the other proprietors, but all must be parties. The allowing one to sue for the rest is only in cases of a general right claimed by all the persons who stand in the same relation to the defendant, as the inhabitants of a parish against the rector, or the tenants of a manor against the lord. It is to save multiplicity of suits, arising from the whole parish or manor being interested.

They also argued that a contributory modus could not be the subject of such a suit. For the ground of allowing one to support the interests of all, is that their rights are similar, and a multiplicity of similar

suits is avoided by it. Here the rights are not similar, but the same joint right, and only one joint suit can be brought to establish the modus, in which all the persons interested must be parties.

They also objected to the description of the lands as a township or district; and that the boundaries were not defined in the bill by abutments, nor by the number of acres. In the evidence it appeared to be a township, and the boundaries were ascertained by the manors on which it abutted on each side.

The Court overruled the objections, and directed an issue to try the modus.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

HILARY TERM,

37 GEORGE III.

COWAN v. PHILLIPS and Others.

THIS bill was filed against twelve defendants; it stated that the plaintiff had employed as his confidential clerk one *Weston*, who had authority to draw on his bankers in his name: that the said *Weston* at various times, between *March* 1795 and *May* 1796, was induced to play with the defendants, or some of them, at games (forbidden by 9 *Ann.*) with cards and dice; and at several times and sittings, during that time, the said defendants, some or one

In a bill of discovery to support an action by a common informer for money won at play, it is sufficient to state that the defendants, or some of them for the benefit and on account of all, played and won.

In such a bill it is not necessary to state the nature of the action brought; it is enough to say that an action was brought on the statute 9 *Ann.* to recover the money, and to shew by the facts, that an action on the statute lay.

of them, won from him large sums exceeding 10*l.* at each time, amounting altogether to above 20,000*l.*, which sums were from time to time paid by him by drafts on the plaintiff's banker, being in fact the money of the plaintiff; and this the bill stated the defendants to have known at the time of their receiving it; that *H. Weston* had not sued within three months for the recovery of any of the said sums, and that no action had been commenced by any person against them for the recovery of the said money, or any part thereof, till the plaintiff in *October* 1796, in pursuance of the powers and provisoes of the said act of 9 *Ann.* commenced an action of debt in *K. B.* for the recovery of monies so lost at gaming, at the said unlawful games, by the said *H. Weston* to the said defendants, and paid by him to them as aforesaid. The bill then charged that the money and bills so given were received by the defendants, or some of them, for the joint use and benefit of all the defendants: that although some or one only of the defendants may have actually played at cards or dice with the said *Weston*, yet such persons or person so played for the benefit of all the said defendants: that according to the rules and manner of playing at some games played between them and *Weston*, the person who deals the cards is the person who actually plays, and appears to win, but that the stock or bank with which he plays is contributed by several who do not appear to play, but are partners with the dealer, and interested in the event of the game, and partaking the profit or winnings; or such dealer is a person employed by some others, to whom the winnings really belong: that the defendants were joint owners of the stock or bank at two houses, at

which the said *Weston* played and lost the aforesaid sums, and that the money lost by him there was divided among them all. The bill prayed a discovery of the matters aforesaid.

The defendants put in separate demurrers.

Grant and *Johnson*, for the defendant *Phillips*, took several objections to the bill. First, they argued that this defendant was not liable to the penalties of the statute 9 *Ann. c. 14*. It is stated that the defendants, some or one of them, played and won at cards and dice. That is no allegation of this defendant having so done; the statute does not attach any penalty on a person receiving a share of the profits from the winner, or being a partner in the chances of the game; the offence originates merely from positive enactment, and must be construed strictly. In the 5th *sect.* partners are expressly included and made answerable, but in this clause no mention is made of them; it might as well be argued that a partner would in like manner be liable to an indictment, without any express provision in the act for that purpose. But the Legislature have negatived that interpretation, by mentioning partners expressly where they are meant to be included.

The plaintiff has not defined the interest which he has in the discovery.—A great part of the case made by the bill consists of a statement of the fraud committed on the plaintiff by *Weston*, with the knowledge of the defendants. The bill then states that an action had been commenced by him for the recovery of the money so lost by *Weston*: those sums

were before stated to have belonged to the plaintiff, and it must be understood that the plaintiff has sued at law to recover this money, as being his own, and received to his use by the defendants. But he adds that that action is brought in pursuance of the provisions of 9 *Ann.*—Now it is clear that the 9 *Ann.* does not authorise any such action; and therefore the plaintiff has shewn no right to maintain his suit at law, nor any interest to have a discovery here for the maintenance of such action.

The plaintiff might, like any other person, sue as common informer, but he has not shewn that he has done so. He says he has brought his action for recovery of the money lost. But the statute gives a common informer treble the sum. The statute makes it a *qui tam* action; this does not so appear in the bill. But a party must shew a right vested in him at law by actual commencement of a proper action, before he can come here for discovery. (*Mynd v. Francis, ante, vol. 1. p. 5.*) The averment of having brought an action pursuant to the statute will not avail, to shew that he has sued properly as common informer. Whether he has pursued the directions of the statute or not, is a matter of law; he is to state the facts, from which the Court is to draw that inference.—Besides the other facts which are introduced, as necessary to support the case at law, and of which a discovery is sought, as being necessary for that purpose, have no relation to an action by a common informer; they explain the action brought, to be some attempt to ingraft a new action upon the statute, so as to give relief to the plaintiff for his personal interest in the

sums lost. They cannot therefore be rejected as surplusage.

Plumer and *Hart*, in support of the bill.--It seems clearly the intention of the Legislature in 9 *Ann. c. 14.* to consider the partners of the person playing, equally with himself, the winners of money at play, and liable as such to the provision of the act. The first part of *s. 2.* is remedial to the loser; this would be wholly ineffectual, if by means of a secret partner, who does not appear to play, the remedy would be avoided. The same expressions are used in the clause which gives the suit to the common informer, and must be construed in the same manner. In common language, the winners are all those who have a joint interest in the money won; and where each player wins for all the co-partnership, they play and win by his agency. It is therefore fair in the Legislature to make them all answerable civilly for the money won. But it is possible that the person playing may be guilty of frauds unknown to the partners of his winnings, and therefore, where the Legislature proceeds (in *s. 5.*) to inflict severe penalties on fraudulent gaming, it separates the characters, and makes the player and his partner each answerable only for the fraud in which he is personally implicated.

As this makes out a sufficient case, under 9 *Ann. c. 14.* to support an action, and as it is averred that an action is commenced by the plaintiff, in pursuance of that statute, the Court cannot say that the plaintiff is not entitled to the discovery sought. It is not necessary to state that it is a *qui tam* action,

or that any other forms directed by the statute have been pursued. That must be presumed by a Court of Equity.

The other matters introduced appear to be irrelevant to the action brought, and are therefore to be rejected as surplusage.

Saturday,
28th January.

MACDONALD, Chief Baron.—When I read over this bill which at present stands admitted, and recollect the consequences(a) of the transactions here inquired into, I cannot help fearing that our judgment might have been warped by the horror of the story. If this bill be true, there is no doubt that the blood of this unfortunate young man is upon the heads of these defendants. For that reason, and from the largeness of the stake, we have wished to pause in deciding it, not from any difficulty in the case itself.

The first objection taken to the bill is, that it does not state what is the nature of the action commenced, and that therefore the plaintiff has not shewn any specific grounds for a discovery; that it is not stated to be a *qui tam* action, and that a large portion of the bill applies to matters not at all subservient to such a suit.—The bill states the action to be brought in pursuance of the statute of 9 *Ann.* By referring to that statute, it appears that two sorts of action are given by it, the one to the party losing at play, if he sues in three months, the other after that period

(a) In consequence of losses at play, and of embezzlement of his master's money to pay them, *H. Weston* was led to attempt to retrieve himself by forgeries, and other similar practices. He was convicted and executed.

to the first informer.—The bill negatives its being the first of these actions, both because it is not brought by the loser, and because three months had elapsed. Then as it is stated to be an action under the statute, and is not an action under the first clause, it must be under the second, *viz.* an action by a common informer. It is argued that the action is not in pursuance of the statute, because it is stated to be brought for recovery of the money lost, whereas a *qui tam* action must be for the treble value. But by the statute, this is the proper mode of suing, and the law trebles the sum proved. The omitting to state any other circumstances as to the form of the action is immaterial in this bill. We are to presume the action is regularly commenced where a right to sue appears.

But it is argued that there is no averment of each individual defendant having won the sums sued for, or any of them. The bill charges that the stock was contributed by all the partners who shared the profits.—In this suit for a discovery, it is not enough to say that a question may arise, whether, by the interpretation of the statute, the owners of the bank are all partners in the playing, and therefore liable. If the plaintiff can shew a fair question to be tried at law, that is sufficient to entitle him to a discovery here. If any doubt can be raised upon that head, the defendants will have an opportunity of having it investigated at law, which is the proper tribunal for such a question. We are not therefore called upon now to determine that point, although if we were, we should certainly feel no difficulty in saying that all the part-

ners in the bank were players and winners within the meaning of the statute.

The demurrer was over-ruled.

Afterwards in *Easter Term*, on 27th *May*, exceptions taken to the answer came on to be argued. The defendant had not answered as to the having a share in the bank, and *Grant* and *Johnson* contended that by so doing, he would subject himself to the penalties of 25 *G. 2. c. 36.* for keeping a gaming-house, as the keeping a bank in a house would be evidence by that statute of being the person who kept the house. And the statutes do not compel the defendant to discover whether he has kept a gaming-house.

To this it was answered that that statute only gave a mode of establishing in evidence, a presumption of the person keeping a gaming-house. It is not here stated that the defendants kept the house, and the fact may be otherwise.—The same statute giving both penalties, and the discovery as to one of the offences, it is impossible to set up the breach of the statute in one part, against a discovery there given of a breach of the other. The act would destroy itself.

The exception was allowed.

— v. BLACKWOOD and Others.

Same day.

THE bill stated that the defendant *Blackwood* won from the plaintiff at play 500*l.*, and got a promissory note for the amount; that he immediately indorsed it to another of the defendants, who indorsed it to the third; that both these indorsements were merely colourable for the purpose of putting the note in suit, and that the indorsees were to have a portion of the profits for lending their names.

The Court will grant an injunction to prevent the negotiating a note obtained at play, upon affidavit, before service of subpoena.

There was an affidavit by the plaintiff to support the bill, stating the consideration of the note, and that he suspected and believed the indorsements to be colourable and with notice.

On this affidavit, *Romilly* moved for an injunction to restrain the ulterior negotiation of the note, to be served with a subpoena.—He considered it as in the nature of an injunction to stay waste; and relied on Sir *E. Smith v. Aykwell*, 3 *Atk.* 566, *Ambl.* 66. *Patrick v. Harrison*, 3 *Bro.* 477.

The Court granted the order.

Same day.

The KING v. PICKMAN.

Where goods are in the hands of a sheriff, and are claimed by a subject as seized under a *fi. fa.* and by the crown under an extent, as having a lien on the goods for duties, the Court will not stay the proceedings of the crown, so as to let the question be tried in K. B. It is the prerogative of the crown to have all questions relating to the revenue decided here.

*Saturday,
28th January.

AN extent issued against the defendant into *Surry*, for malt duties, and certain goods were returned *to have been found upon the inquisition and seized.* After the time for claiming had expired, a *venditioni exponas* issued. The goods had been seized under a *fi. fa.* at the suit of one *Wells*, on process out of K. B. prior to the issuing of the extent, and were then in the possession of the sheriff. The right of the crown was founded on a claim of lien on the goods, being those subject to the duty. The sheriff had also been ruled in K. B. to return the *fi. fa.* On that ground, *Dauncey* had this day* applied to the Court of K. B. and obtained a week's enlargement of the rule to return the writ, in order to compel the plaintiff there to indemnify the sheriff, or to litigate the question here. (See 7 Term Rep. 174.)

He now moved in the same manner to enlarge the time for returning the *venditioni exponas*, for the purpose of making the crown indemnify the sheriff. He argued that the sheriff as a mere stake-holder, was not to be drawn into litigation in a matter where two parties, claiming the same thing from him called upon him to execute his duty in favour of the one or the other. In a doubtful question the sheriff is not to be obliged to decide and act at his peril. For, besides that the Court always protects its officers in the fair discharge of their duty, it is much more expedient that the merits should be tried

immediately between the parties, who know their own cases, than in an action against the sheriff.--And the practice has accordingly been to enlarge the return in each suit, till one of the parties indemnifies the sheriff, or till they agree to try the question between themselves. *Shaw v. Tunbridge*, 2 *Bl. Rep.* 1064. *Hill v. Hook*, in *B. R. E.* 26 *Geo.* 3. and *Semple v. Lord Newhaven*, *M.* 24 *Geo.* 3. cited and relied on in the argument in *K. B. R. v. Audney*, in Exchequer, 23d *January* 1789, arising upon two outlawries contending for priority.

The *Attorney General*.--In questions between subjects, that practice is very expedient and proper, because their rights are equal; there is the same inconveniency in making the point be disputed upon either return. But the crown has a prerogative to have every question relating to its revenue decided in the court which is chosen for that purpose, and whenever that prerogative intervenes, the right of individuals to choose in what court they will proceed, gives way to it. The point to be ultimately discussed is, whether the crown had a specific lien on these goods in respect of the duties arising from them. If the crown is tied up by this motion, and the plaintiff in *B. R.* refuses to indemnify, or to litigate the matter here, the crown will either lose the benefit of its execution, or must indemnify the sheriff and support its rights in his name in *B. R.*



Another reason for the merits being discussed in this suit rather than in *B. R.* is the form of the proceeding, which permits the plaintiff at law to enter his claim, and try the question immediately with the crown. If therefore the Court of *B. R.*

think their officer, the sheriff, entitled to be protected, they ought to stay proceedings there, until the plaintiff shall come in and enter his claim here, and try the question with the crown. They have in former cases enlarged the time till the parties should consent to indemnify, or to try issues, and may equally well substitute this condition which is suited to the particular case.

He also contended that the sheriff was bound at his peril to execute the process of the crown.

He therefore refused on the part of the crown to indemnify the sheriff, or to let the provisions relating to the revenue be called to another tribunal; and insisted, that if the matter could not be otherwise settled, the process of the crown must be executed.

The Court were of opinion that the crown was entitled by its prerogative to have the point discussed here, and assented that the mode proposed was the most proper and eligible for that purpose; but as this depended on the determination of the Court of King's Bench, who had not yet laid the plaintiff at law under such conditions, they thought it would be hard on the sheriff if the *venditioni exponas* issued immediately.

The *Attorney General* consented to enlarge the return for a week.

On the 11th *February*, the Court of King's Bench enlarged the time for returning the *fi. fa.* until the second day of the next term, for the pur-

pose of having the question determined here in the mean time. (See 7 *Term Rep.* 177.)

This matter coming on again, and the *Attorney General* agreeing to waive his right to insist that the time for claiming was expired, the time for making a return was enlarged for eight days, with liberty for the plaintiff in the action in *B. R.* to come in and claim.

Wednesday,
1st February,

The KING v. The Inhabitants of WIMBLEDON. *Same day.*

THE collector of the house and window tax, and of the duty on carriages, in this parish, having failed to pay over to the Receiver General, a re-assessment was directed by the commissioners on all the duties, and those for carriages were raised.

Piggott and *Onslow* obtained a rule to shew cause why this re-assessment should not be declared illegal, and the money raised be applied to the discharge of the parish from the re-assessment on houses and windows.

The *Attorney General* shewed cause, and rested on the 25 *Geo. 3. c. 47. s. 7.* which applies to the raising this tax all the "powers, authorities, rules, directions, penalties, clauses, matters, and things

“ contained in the acts relative to the duties on
“ houses, windows, or lights, for assessing, raising,
“ levying, collecting, and paying the rates and duties
“ thereby granted, so far as the said powers, &c. are
“ applicable thereunto, and not altered by this act.”

He argued, that there was the same ground for making the parish answerable in this case, as for the house and window duties, the collector being equally in both cases appointed by the assessors, who must be parishioners. And if the parish is answerable, as by s. 25. it clearly is, there can be no other mode of responsibility but by a re-assessment, as pointed out in the act referred to, 20 G. 2. c. 3. s. 34.—The objection that the persons liable may be different at the period of the re-assessment, applies to each case. The number of houses or of windows may be diminished or increased, or new inhabitants may have come in.—At all events the motion is wrong in desiring the money raised for one purpose, to be applied to the other taxes.

Piggott and *Onslow* argued that this provision of the acts for granting duties on houses was not applicable to the duty on carriages. Houses and windows may vary in number, but that is not presumed; and at least the existence of houses in a parish is presumed in law. But there is no presumption of the same number of carriages continuing in the parish, or even that there will be one carriage in the parish at the time of the re-assessment. Then the provision which is proper as to a permanent object, as houses, becomes unjust or impracticable as to transitory property, as carriages. It is clear that no re-assessment could relate back to those

who were liable for the original sum ; none of the acts has such a provision.—The application of the money raised according to the form of the motion, must be given up.

MACDONALD, Chief Baron.—When my attention has been called to this subject, I have never been able to understand how a re-assessment could fairly be made under this act.—The clause referred to seems only to give the same mode of assessing and collecting this tax, as on the duties on houses and windows.—But the provision for re-assessment is a distinct substantive enactment, and is not repeated here. There is a distinction between the taxes, which prevents the clause for re-assessment from being equally applicable to this. The one is a general tax on the whole parish; the other on particular individuals, enjoying a particular luxury. The parish being made answerable for their collectors, there is a reason why a general parochial tax should be re-assessed; but in this tax, although the whole parish must also be considered as answerable under the act, the particular individuals only would have to pay.

HOTHAM, Baron.—Probably when this act was penned, the reference to the directions of the former acts was supposed to be sufficient to carry this provision; but in fact the reference rather seems only to relate to the rules for making the original levy; the provision for re-assessment is a distinct specific regulation, and is not expressly ingrafted into the new act; and perhaps that would have been necessary, in order to give so very extraordinary a remedy to the crown.

Upon this suggestion of the opinion of the Court, the *Attorney General* gave up the point, and the motion, so far as regarded the discharging the re-assessment, was made absolute. (See *The King v. St. George's Hanover Square*,—in the following term.)

The KING *v.* The COMMISSIONERS of the NAVY,
the COMMISSIONERS of the SICK and HURT,
and the TREASURER of the NAVY.

The Court will not upon motion enter upon any question of rateability to the assessed taxes.

PERCIVAL moved to discharge process against these defendants, for the amount of the house and window taxes, in respect of their offices.

The point was, whether the offices in *Somerset-house* used merely for the carrying on the public business, should be liable to the duties on houses and windows.

Percival contended, that the clerks doing the public business there were not liable, for they are merely the public servants, as the clerk of a merchant is not liable to the tax, for doing his master's business in his counting house, although perhaps the master has no other use or occupation of it. Wherever an individual has any beneficial occupation under the crown, he is liable to taxes in respect of such beneficial residence; but where the premises are in the

immediate occupation of the public, filled by the public servants for the purpose of performing the public business, no tax is demandable. *Eyre v. Smallpace*, cited 2 Burr. 1059. Lord *Amherst v. Lord Somers*, 2 Term Rep. 372.

The *Attorney General* contrd.

The *Court* thought they could not allow this matter to be gone into. Questions of rateability to these taxes are very numerous, and are all referred summarily by cases to the Judges. If one is gone into in court, another might equally well claim to be so, and the litigation would be endless.

ROOTHAM and Others v. Dawson and Others. Friday,
10th February.

THE bill stated, that the defendant, in 1790, gave a bond to the plaintiffs as parish officers, as surety for *Daniel Dawson* her son, for their indemnification from the expences of his bastard child; that certain sums had already been expended by the parish, and not repaid by him; that upon the execution of the bond, the plaintiffs deposited it in the parish chest, where such papers were usually kept; but on searching for it, to put it in suit, found it defaced, the name of the defendant and other parts of it having been cut or torn off, so that the bond was no longer of any force. The

A bill for discovery of the contents of a lost deed, and to have a new one executed, must be accompanied by an affidavit of the loss of the former.

bill prayed an account and payment of what was due on the bond, and likewise that the defendant might be decreed to execute a new bond to the plaintiffs.

The defendant demurred, for that the plaintiffs ought, according to the rules of the court, to have made an affidavit of the bond being defaced and avoided, as stated in the bill. *

Pemberton, in support of the demurrer. He relied on *Whitchurch v. Golding*, 2 P. Wms. 541. *Anon.* 3 Atk. 17. *Dormer v. Fortesque*, 3 Atk. 132. that where the bill prays relief on deeds lost or destroyed, an affidavit is necessary, because it seeks to change the jurisdiction from the courts of law. Here a discovery would perhaps be sufficient; for since the case of *Reed v. Brookman* it is settled, that a deed may be declared upon at law as having been destroyed, and therefore complete relief may be had there.—But the plaintiff in fact prays relief, and therefore must make the affidavit required.

Thompson, on the other side.—The reason of the decisions in the cases cited determines the extent to which the rule is to be carried, viz. where it is attempted to change the jurisdiction; where the same relief is sought in equity which might be had at law. But where the interference of equity is only sought as auxiliary to the relief at law, by supplying the evidence to support an action, no affidavit is required. *Mitford* 52. 112. *Whitworth v. Golding*, *Moseley* 192. One part of the prayer is, to have a new bond executed, as a security for future ex-

pences which may be incurred by the parish. That relief is merely auxiliary to an action at law for future indemnification; and as the demurrer is general to the whole bill, if bad as to any part, it is bad *in toto*.

MACDONALD, Chief Baron.—Supposing that distinction to be well founded, and that a bill for discovery and re-execution merely would not require an affidavit, you do not ~~here~~ bring yourself within that rule. You do not confine yourself to seeking discovery and re-execution of the bond. You go on to pray general relief in equity, and payment of the sum due. Then you must comply with the general rule in such bills, by making an affidavit.

THOMSON, Baron.—The re-execution sought, is relief, and I do not see why the rule requiring an affidavit should not comprehend it as well as all other cases where relief is sought in equity. It is only substituting a circuitous method of obtaining relief, instead of the direct. As to the case in *Moseley*, the authority of that book is very small.

The demurrer was allowed.

Same day.

The King v. DECKER.

THE defendant obtained an order from one of the Barons to be discharged on common bail, on the ground of the insufficiency of the affidavit upon which he was arrested. The present was a motion to discharge that order.

The affidavit was made by one *Susannah Lynn*, and set forth, that the defendant within six months before “received divers sums of money, and in consideration thereof promised and agreed to repay certain other sums of money, on certain events and contingencies relative and applicable to the drawing of certain tickets in and belonging to a certain lottery, authorised to be drawn in the kingdom of *Ireland*, by a statute passed in the parliament of *Ireland*, contrary to the form of the statute”(a), &c.

Johnson, for the defendant, shewed cause against this rule. He contended, that the affidavit ought to have shewn more precisely the offence committed; the time and sums, and the person from whom the money was received. Upon this affidavit it may be that no offence has been committed, for one species of insuring is lawful, viz. the insuring a ticket held by the party.

(a) 36 Geo. 3. c. 104. which refers to 27 Geo. 3. c. 1.

The Court held the affidavit clearly sufficient.

The rule was made absolute(a).

(a) See *Davis v. Mazzingi*, 1 Term Rep. 705. *Watson v. Shaw*, 2 Term Rep. 654. *King qui tam v. Cole*, 6 Term Rep. 640.

THE ATTORNEY GENERAL v. APPLEBY.

Wednesday,
8th Januar.

THE seizing officer returned the vessel in question, as liable to be forfeited for smuggling; and accordingly an information was filed, and now stood for trial on *Friday* the 10th. At the same time he had instituted a suit in the Admiralty, claiming the vessel as prize as being the property of enemies.

Dauncey moved, on behalf of the defendant, for a prohibition against proceeding in that suit; and insisted, that he was entitled to have either that or an injunction, or at least that the seizing officer and the crown should elect in which court they would proceed; that his client was doubly vexed by this proceeding, and as the same person was the real party in both suits, and claimed the same thing in each, it came within the spirit of the rule of equity of making a party who proceeds in law and equity elect. If either suit superseded the other, he contended that the forfeiture for the breach of the revenue laws was paramount the question of its being enemy's pro-

perty, because this forfeiture is general, and attaches immediately on any vessel's coming within the prohibition of the revenue laws; whereas the right to prize as enemy's property only vested on the subsequent actual seizure. In the case of *Score v. The Lord Admiral, Parker's R. 273*, this principle was admitted, and a prohibition granted upon it(a).

By the Court.—As to the question of election, that cannot take place here. This suit is by the Attorney General on behalf of the crown; that in the Admiralty is by the party claiming the prize. As to granting a prohibition, the argument supposes that the Admiralty is proceeding to condemn a vessel, as prize, which was before vested in the crown, as contraband. The defendant here, by putting in his claim, denies her being forfeited as contraband, and therefore it is not open to him now to suggest in this motion any thing which negatives his own defence. The only way in which the question could have been raised, would have been upon an application by the Attorney General for a prohibition; but that has not been made.

The order was refused.

(a) Mr. Baron Thomson remarked, that upon examining the record of that case he found it not to be reported with perfect accuracy. The principle of the decision may also perhaps deserve further consideration. It seems questionable, whether an open enemy, liable, as such, to seizure, is capable of incurring any penalties under our municipal regulations. In general, jurisdiction and protection are co-extensive.

APPLEBY v. SMITH.

Monday,
13th February.

THE defendant had given the plaintiff a warrant of attorney to confess judgment, and other securities, for an annuity during the defendant's life. The deed by which the annuity was granted contained a proviso for redemption upon certain terms. The memorial enrolled in Chancery did not contain any mention of this proviso. On this ground, *Bailey*, on behalf of the assignees of the defendant, a bankrupt, obtained a rule to shew cause why the judgment securities should not be set aside, and the other securities be delivered up to be cancelled. On the argument, however, it was admitted, that only the warrant of attorney and judgment could be reached by the motion(a).

A clause of redemption contained in the body of an annuity deed must be inserted in the memorial.

The Court cannot proceed, on motion, to order the securities to be delivered up for this omission, but can only set aside the warrant of attorney and judgment.

(a) See as to the question of jurisdiction over the other securities, *Steadman v. Cox*, 6 Term Rep. 739. *Garrood v. Sanders*, *ibid.* 403. *Hart v. Sanders*, *ibid.* 471. The same point came on again in this court in Easter Term following, 19 May 1707. *Jeffrey and Wife v. the Dutchess of Athol*. The plaintiffs brought the action on a bond given by the defendant for securing an annuity granted by her late son Lord *G. Murray*. *Leicester* and *Plowden* moved to stay proceedings, and to have the bond delivered up to be cancelled, on an objection to the registration, that the memorial did not truly set forth, by whom, and on whose behalf, the consideration was paid.

Plumer and *Duncey* shewed cause, and relied on the above decisions, as establishing that the Court had no jurisdiction to direct the bond to be delivered up: as to their staying proceedings, they insisted that the present was like any other case where a security is attacked on any statutory avoidance, as for gaming, usury, or the like. The Courts never try the matter by affidavit, on motion, unless where, by a judgment being given, it is no longer open to the party to try the question regularly.

Partridge and Bailey, in support of the rule.— The act requires that there shall be a memorial of the deed; that is, a statement of the nature of its contents. This memorial states the annuity as absolutely continuing during the life of the defendant. It is, therefore, not a true memorial. The particular requisites of the memorial subjoined in the act are not meant to limit the memorial to those as its constituent parts; among other things it is made necessary to state for whom any of the parties are trustees; the trust may not appear upon the deed; and therefore these particulars are meant as additional statements, not merely as an enumeration of the parts of the deed necessary to be stated in the memorial.

The act is made to avoid the secrecy which encourages such transactions. The benefit is double, both by protecting the grantor from imposition, and by preventing him from obtaining further undue credit, when his fortune is already pledged. In the latter view it is material that the grantor shall not appear to be more incumbered than he really is. Accordingly every material part of the deed must be expressed in the memorial.

For the defendant, it was urged, that the ground of interference after a judgment confessed was, that any proceedings on a security declared by the legislature to be void, were irregular; that will apply to stay proceedings commenced, as well as to set them aside when completed.

The Court held clearly, that they had no authority to direct the security to be delivered up, the cases in which that is given by the fourth section of the act being specifically defined; and that the present was, like any other security of questionable validity, to be decided at the trial, not on a summary application.

The insertion of this clause might also be insisted upon under the term "consideration or considerations." The whole benefit received or retained by the grantor are the considerations of the grant.

This point was before the Court of K. B. in *Sawyer v. Bunce*; and a strong opinion was intimated upon it; but it was not determined till the case of *Steadman v. Purchase*, 6 T. Rep. 737. That case was in every respect similar to the present, except that the clause of redemption was in an indorsement, but executed at the same time with the body of the deed. It was attempted in argument to found upon that circumstance as rendering a memorial of the indorsement necessary, considering it as a separate instrument. But that argument would rather have turned the other way; for if it were a separate instrument, as it neither granted nor secured the annuity, it would require no memorial. Accordingly we cannot suppose that the judgment of the Court of K. B. proceeded on that distinction.

Plumers shewed cause against the rule.—This case does not fall within the general intent of the act. It is made to protect the grantors of annuities from the danger of extortion, "which is much promoted by the secrecy with which such transactions are conducted." For that purpose the whole of the benefit to be received by the grantee is peculiarly meant to be laid open. But this is a proviso in favour of the grantor. All the benefit obtained by the grantee is disclosed; and as that benefit is subject to a clause of redemption, it is even less than what appears upon the memorial.

Neither is it within the words of the statute. The act first declares of what deeds a memorial shall be made, and then describes the requisites of such memorial. It must set forth the date of each deed, the names of the parties and witnesses, the annual sum to be paid, the person for whose life the annuity is granted, and the consideration: all these are set forth. Beyond those requisites it is not necessary to set forth the deeds: yet in fact every covenant and clause is meant to give, and probably does give, some additional benefit to the one party or the other; and if the whole benefit to be received on each side were meant to be accurately set out, it would require a transcript of the deeds, not merely a memorial of their existence. The clause of redemption is in the same situation with every other covenant beneficial to either party. If it requires to be registered, the whole must, and the particular parts of the deeds directed by the statute to be set forth, instead of pointing out the proper memorial, will only serve to mislead.

THOMSON, Baron.—Suppose in *Middlesex* a deed was registered as an absolute conveyance, omitting to mention a clause of redemption, which rendered it only a mortgage; would that be a good registration?

Plumer.—The two acts are made with different views. The registration of deeds in *Middlesex* is meant to point out the nature and extent of incumbrances or conveyances, for the safety of subsequent purchasers: this act is made only for the safety of the grantor.

Bailey.—The present seems even a stronger case. By the county registration acts only the general

nature of the incumbrances is necessary to be set forth, so as to give notice of their existence; here the object is to get accurately at the nature of the transaction.

Plumer.—It is no objection that the memorial states the annuity to be granted for the life of the defendant, whereas in truth it was only conditionally so granted. The act requires, that where an annuity is granted “for one or more life or lives,” there shall be a memorial, setting forth the name of the person or persons “for whose life or lives it is so granted.” If this is an annuity granted for the life of the defendant, we have complied with the act; if it is not, then it is not such an annuity as requires to be enrolled at all.

The clause of redemption cannot be considered as part of the *consideration*, and as such necessary to be set forth in the memorial. It is a diminution of the value of the thing granted, not a part of the consideration of the grant. The meaning of the word *consideration* is established by the third section, which requires that it shall be in money only.

None of the cases decide this point. *Steadman v. Purchase* was different in this respect, that the clause of redemption there was by a separate instrument, viz. by an indorsement upon the annuity-deed; and the counsel for the defendant insisted on that as a separate deed, relative to the annuity, and therefore necessary to be enrolled. The reasons of the judgment are not given in the report: they probably followed the reasoning of the counsel.

THOMSON, Baron.—If such an indorsement was a separate deed, it would require fresh stamps.

The case stood over (a) till this day, when the Lord Chief Baron was proceeding to give the opinion of the Court, upon the authority of *Steadman v. Purchase*, as not being fairly distinguishable from the present.

Russet, amicus Curie, stated, that a case containing circumstances similar to the present had since come before the Court of K. B. who had hesitated upon the point, and not yet given their judgment.

The Court afterwards, on the same day, informed the counsel that, upon inquiry of the judges of K. B. they found the difficulty in the case before them to arise upon a collateral point, no doubt being entertained upon this question; that if that Court had had doubts of the propriety or application of its own decision, they could not have proceeded to act upon it without conferring with the other judges. That difficulty being removed, and the case of *Steadman v. Purchase* appearing to them perfectly satisfactory upon the question, they directed that the rule (as to the judgment and warrant of attorney) should be made absolute (b).

(a) It was argued in *Michaelmas Term*.

(b) This point came before the Lord Chancellor at the Sittings after this term, *Greaves v. Bainbridge*, 9th March 1797, on a motion to have money paid out in discharge of the arrears of an annuity. The clause of redemption was in the body of the deed, and was omitted in the memorial. On this ground the Attorney

The ATTORNEY GENERAL v. FERRIS.

Same day.

THIS was an information, "for that the defendant, " being a person using and exercising the trade " or mystery of tanning of leather, did, during the " time he so used the said mystery or trade of a " tanner, exercise and use the trade and mystery of

The venue of an information on 24 G. 3. c. 19. for being both a tanner and a shoemaker, need not be laid in the county where the offence was committed.

General objected to the annuity, and opposed the motion, relying on *Appleby v. Smith*.

Stratford argued from the words of the act, and from the apparent grounds of decision in *Steadman v. Purchase*, that this clause did not require to be registered, as not being one of the requisites of the memorial mentioned in the act.

LORD CHANCELLOR.—The act directs, in the first place, that you shall enrol a memorial of the deed. It then directs certain other particulars to be described. The complying with the latter clause does not dispense with the former; and it cannot be said that you have enrolled a memorial of this deed, when so material a clause, essentially changing the nature of the grant, is omitted.

As to the decision in the Court of K. B. *Steadman v. Purchase*, if it proceeded upon the ground that the indorsement, as a separate deed, relating to the annuity, of course required to be registered, I should hesitate to agree to such a principle. The act directs a memorial to be made of all deeds by which annuities are granted or secured. A separate instrument giving a power of redemption certainly is not such a deed; and I am not prepared to say, that by any rule of construction the act could be extended to it.

See also the case of *Harris v. Stapleton*, in B. R. in the term following, 7 Term Rep. 205.

old forfeiture of the hides, expressly recognizing the 1 J. 1. "and all clauses, matters, and things therein contained," (other than such as have been altered by law or statute since that time made, and now in being,) "as still remaining in full force." Then the only question is, whether the superadding another penalty changes the nature of the offence, or whether it is still an offence under 1 J. 1. unaltered, except as to the penalty. But it seems clear that it cannot have that effect; *per Saunders*, Ch. B. *Plowd.* 206. *a. Wallis v. Hodson*, 2 *Atk.* 118. *R. v. Morgan*, 2 *Str.* 1066. *Ridley v. Bell*, *Lutw.* 67. *Shipman v. Henbest*, 4 *Term Rep.* 109. which latter case was upon this act, 1 J. 1. as affected by 21 J. 1. and by 9 *Ann. c.* 11. By these cases it appears, that where a subsequent statute is made, merely to re-enact or continue a former, or even to add fresh penalties, they make but one statute; it is the old statute, although altered.

As to its being a matter of excise, if this were a suit for the duty, the argument would be true; or even if it were a suit for breach of a regulation introduced for protecting the revenue: this is a regulation existing before the excise on leather, and independent of it, and happens only incidentally to have an effect in protecting the revenue.

The case stood over till this day; when the opinion of the Court was delivered by

MACDONALD, Ch. Baron.—The first statute upon this subject is the 1 J. 1. That was a commercial regulation, introduced merely for preventing frauds in the manufacture; and accordingly all its provisions

are directed to that object alone. It was afterwards found necessary to lay a duty on leather; and the 9 *Ann.* by which the duty was imposed, re-enacts the 1 *J.* 1. so far as related to the purposes of the tax, it was an obvious mode of evading the duty, if the tanner, who was bound to have a stamp on each hide, could cut up the hides into a manufactured form; for then it would be impossible to say whether each hide had been stamped or not; accordingly the 9 *Ann.* re-enacts the provisions of the 1 *J.* 1. to prevent a tanner exercising any of those trades which require the cutting up of leather (a). It also meant to extend those provisions to *Scotland*; whereas the former act necessarily comprehended *England* only. It cannot, therefore, be considered as a mere recognition of the 1 *J.* 1. when it is expressly introduced completely *diverso intuitu*, and has a new and more extensive sphere of operation. The 24 *Geo.* 3. makes still greater alterations, by imposing the penalty here sought of 50*l.* and by a slight alteration in the mode of describing the offence.

The objection taken to the information is, that, although purporting to be on 24 *Geo.* 3. although seeking the penalty there imposed, and couched in the terms there employed, it is yet in fact a suit on 1 *J.* 1. and therefore within the operation of 21 *J.* 1. as to the venue; that the 24 *Geo.* 3. and 9 *Ann.* by referring to 1 *J.* 1. incorporate it into themselves with all its consequences; and therefore the latter continues still to be the leading

(a) See the *Attorney General v. Dennis*, *ante*, vol. 1. p. 166.

statute. The distinctions I have pointed out, the different objects of these provisions, the extended operation, difference of expression, and new penalties, negative the idea of the latter statutes being entirely referable to the former; and especially in a suit seeking a penalty created by the last statute.

The cases cited are all different from the present, being merely cases of continuance of former statutes, or of variations unimportant to the questions there discussed.

But in these statutes, 9 *Ann.* and 24 *Geo.* 3. the provisions of 1 *J.* 1. are "re-enacted" for a different purpose. Accordingly, in *Hibbert's* case, the Court considered them as distinct substantive statutes; and we agree in that opinion.

The rule was discharged.

SITTINGS AFTER HILARY TERM.

GROWSOCK v. SMITH.

Serjeants Inn
Hall.Friday,
3d March.

At a sale before the Master, *Collett* was the purchaser of one of the lots. It consisted of copyhold premises, which were at the time under lease, at a peppercorn rent, for a term, of which seven years were then unexpired. The purchase-money was not paid in till very lately, a year and a half having elapsed after the purchase. The vendor did not deliver an abstract of the title till about six months before this motion, and no conveyance had in fact been yet made.

A purchaser of a future interest, after a term, shall not pay interest, or an increased price for a part of the term elapsing before the purchase is completed, unless the delay be by his fault.

Hollist moved, that it might be referred to the Master, to take an account of the difference of value of the estate by the lapse of time after the purchase. He relied on *ex parte Manning*, 2 P. W. 410. *Davy v. Barber*, 2 Atk. 489. *Blount v. Blount*, 3 Atk. 636. that where there is a rise in value in the estate after the purchase, an equivalent must be paid by the purchaser. Those were cases of rises in value by accidental circumstances, the falling-in of lives: here it is stronger: the estate is in truth a reversion expectant on a term of years; the benefit, therefore, from the lapse of time is

CASES IN THE EXCHEQUER,

whereas, in the other cases, the purchaser's benefit was uncertain and accidental. In the case *ex parte Manning*, the proper equivalent was considered to be the payment of interest on the purchase-money: but in the latter cases Lord *Hardwicke* thought it more equitable to direct an inquiry into the actual rise of value.

The rule is not founded on any misconduct of the purchaser, but on the actual advantage received by him, and for which he ought to pay. If it is an estate in possession, and the purchaser is let into possession immediately, he must pay the purchase-money, or interest for it, from the same time, or some equivalent for the profits. By the running of the term the purchaser has received the profit of the purchase, according to the nature of the interest bought, and cannot claim to receive that benefit for nothing. If this delay had arisen after the purchase of an estate in possession, it would be fair that no interest should be paid till possession delivered; for each has its profit; the vendor retains the land, the purchaser his money: but in this case the purchaser has, by the delay, the full benefit of his purchase, and of his money also.

Richards, for the purchaser, argued, that by the case of *Blount v. Blount*, the purchaser of a reversion is not bound to pay interest for the mere wearing-out of the particular estate, unless he has been guilty of delay, by retarding the conveyance or payment of his purchase-money, or unless some occasional accidental benefit has arisen, as the dropping of a life.

MACDONALD, Chief Baron.—Till a good title was made out, the purchaser could not be called upon to pay in his money, and therefore cannot be made to pay interest for withholding it. It is the vendor's own fault that he did not tender a title and conveyance sooner. The period that has elapsed since a title was made out, about six months, is too trifling to be the subject of any complaint against the purchaser, or the foundation of a motion like the present.

The order was refused.

GILL v. MATHEWS.

*Saturday,
4th March.*

AFTER answer, the plaintiff had an order to amend, by adding a defendant, and amended accordingly. The cause being now ready for publication, the original defendant, in order to delay its passing, took out an order for time to answer the amended bill. The plaintiff gave a rule for publication.

Where the bill is amended after answer, by adding a defendant, the original defendant cannot answer the amended bill, nor have any order for time to answer.

Hart moved to discharge the rule, and insisted, that a defendant is universally entitled to put in an answer to an amended bill; and therefore the order for time to answer was regular, and stopped publication.

Romilly.—That is only where by the amendment some new matter is put in issue between the parties,

not upon a mere formal amendment, by addition of a party. To allow an answer in this case can have no effect but delay.

The *Court* were of opinion that the defendant had no right to answer; that his order for time was therefore a nullity, and the rule for publication regular.

SHEDDEN v. BARING.

PLUMER and *Steele*, on behalf of the plaintiff, moved for a commission to examine witnesses abroad, to defend an action in *C. P.* at the suit of the defendant here, which stood for trial immediately. They produced an affidavit of the plaintiff's solicitor, that, from inspection of certain papers obtained from the defendant, he believed the examination of persons in *Philadelphia* to be necessary. They argued this affidavit to be sufficient, especially where no injunction is prayed.

Romilly objected, that this order could not go, unless upon good grounds; that the affidavit should be positive, and by the party himself, or a reason shewn to the contrary. *Coote v. Coote*, 1 *Bro. R.* 448. *Oldham v. Carleton*, 4 *Bro. R.* 88. The opinion of the solicitor was grounded on papers, which ought, therefore, to have been produced, that the Court might form their own opinion. Although no com-

mission is moved for, yet it must have weight, upon an application in *C. P.* to put off the trial, that this court has issued a commission to examine witnesses abroad; for that is only done upon shewing sufficient probability of its being material.

The *Court* thought the affidavit insufficient.

The order was refused.

BROOK *v.* WENTWORTH.

Same day.

THE defendant, the author of a book about to be published, agreed with the plaintiff a bookseller, to publish it. The plaintiff was to have a certain portion of the profits, besides interest for any sums which he might happen to be in advance during the publication.—Having advanced a considerable sum, he refused to go on unless he were paid what was then due to him. It was not paid, and the work was stopped. Afterwards the defendant agreed with another bookseller to publish it. This motion was for an injunction to stop the publication till the plaintiff should be paid what was due to him, a bill having been filed for that purpose.

Plumer and *Finch*, for the plaintiff, argued, that he had a lien on the work by the agreement, and was to be considered like a purchaser to that extent.

Fonblanque, for the defendant.—The copyright remained in the author, and this sort of motion is never granted, unless where the copyright is attacked. As to lien, he contended that that could only take place in regard to the sheets in the plaintiff's possession.

The *Court* declared the inclination of their opinion to be, that the plaintiff was entitled to have an injunction on such an agreement, as well as if he had absolutely purchased the copyright. They however recommended an arbitration, to which the parties consented.

JONES & Ux. v. MARTIN Clerk.

Where a father covenants on his daughter's marriage to leave her at his death an equal share of his personalty with his son, a gift of his property in the funds to the son, reserving the annual dividends for his own life, is not a breach of the articles.

UPON the marriage of the plaintiffs in 1767, *Martin*, the father of Mrs. *Jones*, covenanted to leave her, upon his death, certain tenements, and that he would "at his decease, by his will, give and leave her a full and equal share with her brother and sister, of all the personal estate of him the said *T. Martin* the father, to be held and enjoyed immediately after the decease of himself and his wife." He also covenanted to pay them 100*l.* a-year, during the lives of himself and his wife.—The wife of the father died in 1785. The sister of the plaintiff and defendant died without issue in 1779.

At the time of these covenants, *Martin* the father was possessed of considerable property, real and personal. From 1769 to 1786, he sold all the parcels of his real estates, and invested the produce, together with his other personal estate, in back-stock. Four fifths of the realty had been so disposed of before 1775. In *July* 1783, he submitted a case for the opinion of Mr. (now Lord) *Kenyon*, who advised that the father was not restrained by the covenant from giving away any part of his personal estate, provided the gift were absolute, and to take effect in his lifetime (a). 'Immediately thereupon Mr. *Martin* the father transferred into the name of his son, the defendant, 3000*l.* bank stock, which by subsequent transfers between that time and 1788, was increased to 4448*l.* bank-stock; the defendant verbally promising to pay to his father the dividends for his life. —The whole purchase-money of the bank-stock was 5735*l.*, of which 3072*l.* was the produce of the realty, and 2663*l.* personalty.—In 1786, the plaintiffs threatening to dispute these transfers after the death of the father, the defendant suggested to him and wrote a declaration of his intentions and conduct in the above particulars, which the father copied and subscribed. He there declared that he considered himself at liberty under the articles to give to his son any part of his property during his life, and that he had always intended that the real estate or the produce of it should go to him.

(a) A second case was submitted to the opinion of Sir *John Scott* in 1788, (after all the stock had been transferred to the son,) who upon the whole case inclined to think that the transfer could not be set aside as a fraud upon the marriage articles.

It appeared that the bank-stock transferred, and which had been the produce of the personal estate, was nearly of the value of the benefit received from the father by the daughter (the plaintiff,) under the articles, and otherwise, independent of the share she would be entitled to at his death; and that he considered this part of the stock, transferred to the son, as an equivalent for such benefit received by the daughter. Both the plaintiffs and the defendant had at various times received money from the father; the latter to considerably the greater amount.

The defendant in 1789 sold out the bank-stock for 8050*l.* and invested the produce in *India* stock. This was done without the privity of the father, and from that period the defendant only paid him the amount of the dividends on the bank-stock, which was less than the dividends of the *India* stock purchased with it.

The father, by his will in 1786, left all the property he should die possessed of to be equally divided between his son and daughter. He died in 1792, aged 90 years.—The property which remained to be divided under the will was about 180*l.*

This bill was filed to have an account and equal distribution of the stock transferred to the son, and of all property received by him in the life of the father, as being a fraud on the articles. The answer insisted on the transfer as a valid and *bona fide* gift.

The plaintiff produced letters from the defendant to his broker, directing that the dividends of the bank-stock transferred to him should be regularly paid to his father during his life. Letters were also produced from *Martin* the father to the broker, in one of which (in 1788) he used this expression: "so that what money I have in the bank is in my son's name." There was evidence of frequent declarations of the father, that he had transferred the stock to the defendant, reserving only the dividends for his own life,

Burton, Partridge, and Ainge, for the plaintiffs, argued, from the whole of the evidence, that the son was only trustee for the father, and that the transfer was colourable,

That even if no actual trust could be proved, the circumstance of the father retaining the dividends during life, was legal evidence of fraud under the plaintiffs, as creditors, and similar to the retaining possession of chattels after a pretended conveyance. A father vesting property in the name of a son, not under age, and already provided for, (as the defendant was,) if he continue afterwards to take the profits to himself, shall be understood to have retained the whole beneficial interest, and to have used the son's name only as a trustee. *Lloyd v. Read*, 1 P. Wms. 608. The circumstance of the subsequent transfer to *India* stock, and the retaining the additional dividends, was merely a fraud on the father, but did not alter the nature of the trust.

The marriage articles gave the plaintiffs a vested interest in the property, which could not be divested by the covenantor or volunteers under him. *Vez.* jun. 478. The father put himself by the articles in the same situation as a freeman of *London* was in by the custom; with this difference, that his covenant is to be taken more strongly against himself than the obligation of the custom which was against common law. A freeman could not by a voluntary gift in his lifetime to a child or grandchild defeat the right of the widow or children. *City v. City*, 2 *Lev.* 130. *Northey v. Burbage*, *Prec. in Ch.* 470. and the case is still stronger, if the benefit is only to arise after the death of the freeman. *Fairbrand v. Bowers*, 2 *Vern.* 202. *Edmundson v. Cox*, 7 *Viner*, *Custom of London* (B 3.), *pl.* 11.

As to the fund from whence the purchase-money of the bank-stock was originally drawn, it is immaterial. The immediate intention of the father was merely to increase his income, by investing his property in the funds, instead of land. Accordingly, from 1769, when the largest portion of the land was sold, till 1783, it remained as his personal estate, without any hint of an intention to consider the son as having any claim upon it, although the father was then 81 years of age; and if he had died in that period, as was to have been expected according to the usual course of events, it would have been distributed under the covenant as personalty, and he must have been aware during all that time that such would be the case. The declaration of intention in favor of the son, as being the produce of land, was

therefore an after-thought, and could not restore the nature of the property. If the committee of a lunatic apply his estate for his benefit, the Court will not inquire how the rights of his representatives may be affected; and even a change from personalty to realty, or *vice versa*, will not be set aside by that consideration; *Oxendon v. Lord Compton*, 5 *Vez.* jun. 74. much more so where the party himself, in the management of his own property, has made the change.—At all events this would only cover a part of the stock.

Plumer and *Stanley*, for the defendant.—They insisted that the evidence proved a real transfer to the son, subject only to the life-interest of the father, which considering his age, was not worth more than one tenth of the property transferred. No further trust is admitted or proved, nor can be presumed. The transfer vested the possession in the son, therefore it is not like the cases of grants where the possession is retained by the grantor. As to the custom of *London*, the cases arose upon colorable grants where the grantor really parted with no interest in his life-time. But if the custom of *London* had extended to prevent the father from making a real *bona fide* gift either to a son or any other person, it is therefore unlike the present covenant which does not go that length.

The case stood over for judgment till this day.

MACDONALD, Chief Baron, stated the nature of the bill, the marriage articles, &c.

From 1773, the testator was busy in changing the nature of his property by selling his real estates and purchasing in the funds; the only object of this change seems clearly to have been the increasing the annual income to arise from it; not the altering the succession to the prejudice of the son. While this plan was yet going on, in 1786, he made his will, which purports to be in conformity to the covenants in his daughter's marriage settlement, for he leaves to her one moiety of his personal estate, at the time of his decease.

At the time of the marriage articles, it must have been in the contemplation of the testator, and of all parties, that the real estate would descend to the defendant the son upon his father's death; and it appears to have been the intention of the father, when he changed the nature of the property, by investing it in the stocks, that the son should have the same benefit from it as if it had continued realty; that is, that he himself should continue to have the annual produce during his life, and his son the whole at his death. This intention seems not to be liable to any objection as a fraud on the daughter; and the correspondence with the stock-broker, and the other circumstances relied upon to give that color to the case, seem therefore wholly immaterial. The only question is, whether, within the fair construction of the covenants, he had a power to dispose of his stock, reserving to himself the dividends for life.

There is no doubt that within this covenant it was open to him to give any part of his property to either of his children during his life, provided

it was a real and irrevocable transfer ; accordingly the different sums of money or other benefits which each of these parties received from him absolutely in his lifetime, cannot be now inquired into. The transfers of stock to the son appear to have been of the same nature ; the absolute legal right was transferred to him without any power left in the father to control or revoke his gift. It was understood between them, that the father should enjoy the dividend for life ; but with that reservation, there is no ground to suspect that the transfer to the son of all the remaining interest was not a real transaction. The present right in the dividends for life, and the future interest in the stock, are well known as separate and distinct rights in this sort of property, and are sold as such every day. Here the future right was vested absolutely in the son, and in case of his bankruptcy would have been liable to be sold for the benefit of his creditors, not for those of his father.

- Of the cases produced no one goes upon a covenant like the present, so as to decide that a transfer with such a reservation is a fraud on such a covenant. But it has been assimilated to the right of equal partition, under the custom of *London*, and cases have been cited relative to that custom. The comparison is not accurate.—It is admitted that the testator was not restrained by this covenant from giving any part of his property in his lifetime, to any one of his children, and that the remaining personalty at his death was alone subject to the covenant ; but by the custom of *London* every thing given by the father in his lifetime, to any

child, was carried to account against that child when claiming his share of the estate. There is therefore a much stronger claim upon the property of the father under the custom, than by a covenant like the present.

But even those cases will not make out the proposition contended for. They will all be found upon examination to have proceeded on the ground that the bequests were in their nature testamentary, not absolute and irrevocable. In the case of *Edmundson v. Cox*, 7 *Vin. Abr.* 202. *pl.* 11. the deed was never delivered, and therefore was not binding on the grantor as a gift. The note in 2 *Levinz* is too loose to be much relied on. But the distinctions as to the custom of *London* are clearly defined in the case of *Hall v. Hall*, 2 *Vern.* 277. *viz.* that an absolute gift is good, but if the freeman retains a power over the property, it is a fraud on the custom, and void. In *Turner v. Jennings*, 2 *Vern.* 612. a deed purporting to convey an absolute future interest was held void only as being so recently before the death, as to be merely a *donatio causa mortis*, and in its nature a testamentary bequest, although in the form of a deed.

In *Tomkins v. Ladbroke*, 2 *Vez.* 594. Lord *Hardwicke* recognized the same doctrine, and set aside the deed as being not an absolute gift, but in the nature of a testamentary act.

In the present case the children had no right in the personal estate of the father during his life; they had a mere inchoate right to equal shares of the personalty which he should leave at his death. This

portion of his property, his stock in the funds, was conveyed to the son during the life of the father by a transfer in all appearance absolute and irrevocable; and the reality of its being such appears from the declaration of the father, that he considered the son entitled to it, in lieu of the real estates which would have descended to him, and the sale of which principally produced this fund. As the father retained no dominion over it, it cannot be compared to those cases where the grantor kept the deeds in his own possession, or otherwise attempted to make a grant ambulatory and revocable till the time of his death. We are therefore of opinion that this transfer to the son was no fraud upon the marriage articles of the daughter.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF EXCHEQUER,
IN
EASTER TERM,
37 GEORGE III.

In Error.
Wednesday,
10th May.

KIRBY v. SADGROVE.

A commoner cannot justify cutting down trees planted by the lord on the waste, but is driven to his action if there is not sufficient common left.

THIS was an action for cutting down trees.—*Plea*, that the trees grew in a certain common field in which the defendant (plaintiff in error) had right of common for his sheep. And because the said trees had been wrongfully planted and were wrongfully growing upon the said common field, incumbering the same, &c. so that the defendant could not, without cutting down the same, enjoy his common of pasture in so ample and beneficial a manner as he otherwise might have done, the defendant cut down the trees, &c.

Replication. That the place in which, &c. is parcel of the contiguous manors of S. and B. and of the wastes thereof, that the plaintiff is lord of the said manors, and planted the said trees.—To this replication there was a general demurrer.

The Court of King's Bench gave judgment for the plaintiff. *Vide 6 Term Rep.* 483.

Shepherd, Serjt. for the plaintiff in error.—He argued that in general every party has a right to abate an nuisance by which his property is invaded, although it stands upon the soil of another; as in the case of a dam flooding my lands or stopping my water-course, obstruction of antient lights, ways, &c.—So in the case of commoners, whenever the injury totally destroys the exercise of the right of common in any part of the land, and the lord does not plead that he has approved under the statute, leaving sufficient common, the commoner may abate; 29 *Ed.* 3. *pl.* 6. 15 *H.* 7. *pl.* 18. *Bro. Abr.* title *Common*, *pl.* 9. 2 *Inst.* 88. *Sir W. Jones* 222. *Penruddock's* case, 5 *Co.* 100. 9 *Co.* 55. *Cæsar v. Mason*, 2 *Mod.* 65.—The cases where it has been held that the commoner cannot abate, have been where the injury committed by the lord has arisen from the excessive use of a right otherwise legal and consistent with the rights of the commoners; as in surcharging the common with cattle, or with conies. *Cooper v. Marshall*, 1 *Burr.* 259. where the distinction is taken between the excessive use of a right consistent with the right of the commoners, and those erections which are in their nature inconsistent with the right of common, and which may therefore be abated,—

But planting the common with trees, if by reason thereof the commoner cannot enjoy his common in so beneficial a manner as before, as is here alleged, is equally inconsistent with his right as the inclosing with a hedge.—Another distinction taken in that case was, that in destroying the coney-burrows, the soil and inheritance was injured.

BULLER,—J.If you admit that ground of decision, you must, in order to support your case, maintain that the cutting down a tree is not meddling with the soil. The principle of that determination is, that a commoner cannot abate where in doing so he hurts the inheritance.

Shepherd, Serjt.--The cases where the commoner has abated hedges and fences, are precisely similar to the present. In *Mason v. Cæsar* it was determined that a commoner might abate a hedge, because that was not a meddling with the soil for this purpose. A tree is no more a part of the inheritance and soil than a hedge.

Whenever the law gives an action for a nuisance, the courts ought to incline to allow the nuisance to be abated; for otherwise there would be endless suits for the tort, which the law abhors, and no power in the law to remove the injury. A nuisance by surcharging the common is not a continued nuisance, like erections, hedges, or trees, and therefore this reason of allowing abatement of it does not apply. As the lord has not pleaded the statute, he cannot consider it as an improvement.

EYRE, Ch. J.—The planting trees by the lord is not at all in the nature of an approvement under the statute of *Merton*. It is an exercise of his original right in the land, which may or may not be a nuisance to the commoner, according as it affects materially the benefit of his right of common. The claim of the commoner is merely an easement, to be taken subject to the right of the soil in the lord, and cannot control the exercise of the superior right, except where this becomes inconsistent, exclusive, or destructive of the right of the commoner.—If the lord exercises his right of ownership in a manner which totally destroys the exercise of the right of common, as by inclosing, or shutting up the way to it, the tenant is at liberty to abate the nuisance. But if it is a question as to the excess of a legal use of the soil, the commoner is not to judge of this excess, but must bring his action.—Planting trees may be a great benefit to the common of pasture, from their shelter; then it is not necessarily inconsistent or destructive of the right of common; and where by turning too much to planting there is not sufficient common left, it is a question of excess of legal right, and to be tried in an action, not by abatement.

Even where the nuisance operates a total exclusion of the right of the commoner, yet if it cannot be abated without meddling with the soil of the lord, it appears from all the cases, that the tenant cannot justify any damage to the inheritance, in proceeding to abate it, but is driven to his action. I apprehend it will be difficult to maintain that cutting down trees is not a meddling with the soil.

The case of *Cooper v. Marshall* governs this case, and I think we ought to support the spirit of that determination.

Abatement ought only to be allowed in clear cases of nuisance where the injury is apparent on the first view of the matter. The abater makes himself his own judge, and proceeds at his own hazard to destroy the thing which he considers as an infringement of his right; whereas in an action, the invasion of his property meets with a fair discussion, and obtains for him a proper recompence, without the previous destruction of the thing in dispute. We ought not to strain a point to let in this species of remedy, and the cases are clearly the other way.

The other judges concurring,

The judgment was affirmed.

Friday,
26th May.

KNOTT v. BARKER.

The Court will not stay an action of trespass for seizing goods on the defendant's restoring them or the value, with costs, where it will not end the suit, and value is not admitted.

THE defendants seized twelve hides brought to market by the plaintiff in *London*, and proceeded under 2 Jac. 1. c. 22. before the triers, for condemnation: two were condemned, but the validity of the sentence of condemnation was disputed, and this action of trespass was immediately brought for the taking all the twelve.—A rule was obtained to shew cause why, on return-

ing the ten hides or their value, and payment of costs, proceedings should not be stayed, or the plaintiff to proceed at his peril.

Plumer and *Marryat* shewed cause.—They insisted, that these orders were rarely made for return of goods, and only where it would end the suit; that the detention of the goods, upon a charge which implies bad workmanship, might affect the plaintiff in his trade. That is laid as special damage in the declaration; and the jury alone can apportion it. The necessary damages for their detention, and the value of the leather, in case the article is spoiled, are proper for the same tribunal. In *Pickering v. Truste*, the value was admitted.

Partridge and *Dampier* on the other side.—The case of *Pickering v. Truste*, 7 *Term Rep.* 53. was precisely like the present, except that there the defendants offered to return the whole hides sized. Every objection to the present application would have applied there; yet the Court granted the rule. There is no affidavit of special damage, and therefore it is not to be presumed. The Courts, by staying proceedings on the return of goods, treat it as a payment of money into court; and if the plaintiff chooses to go for more than is offered, that being the only thing remaining in dispute, the ulterior costs sought to abide the event; otherwise it may appear by the verdict, that the suit was proper only to the extent of the hides offered to be returned, and the plaintiff will be proceeding on a groundless claim for the other two, with a certainty of a verdict and costs. There being no provision in the act to exempt officers from costs

on seizures with probable cause, (which they shewed to exist in this case,) makes them peculiarly entitled to the protection of the Court in the fair discharge of their duty.

The Court thought that such orders, in actions of trespass for goods, were only proper where the whole suit would be ended by it, the object of the Court being to stop litigation. But here the parties have a question to try on the other parts of the case, and the suit must proceed; besides the difficulty of ascertaining the value before the Master, distinguishes it from the case in *K. B.*, where the value had been admitted.

The rule was discharged.

Same day.

THE KING *v.* BELLAMY.

On an appeal from a conviction for killing game, on 13 G. 3. c. 80. the Quarter Sessions may either order payment of the penalty, or imprisonment. A recognizance of a surety taken for trying the appeal, and paying the penalty with costs, on affirmance, is bad.

THE defendant was convicted, under the 13 *Geo. 3. c. 80.*, for killing game. He appealed, and entered into recognizance with two securities, conditioned to try the appeal, and in case of affirmance to pay the penalty or forfeiture of 20*l.* together with such costs as should be awarded. At the Quarter Sessions, the conviction was affirmed, and the defendant ordered to pay the penalty and costs. This he was unable to pay, and was taken into custody, and detained two days, but brought up again before the end of the sessions, and discharged, the Court not considering themselves entitled to confine him.

An order of the justices to keep in confinement for two days, during their sessions, is not a commitment in execution for this offence, which must be for three months, if at all.

Rose moved to discharge the recognizance of the securities, (which had been estreated,) on two grounds;--the informality of the condition of it, and the satisfaction of the sentence by imprisonment.

The 13 *Geo. 3. c. 80. s. 4.* directs a recognizance, conditioned that the defendant "shall *abide the order of*, and pay such costs as are awarded by, the "justices." He argued, that the condition of this recognizance, *to pay the said penalty*, and the costs awarded, was a material variance, as the order of the justices might not be the payment of the penalty, but imprisonment or distress. He also insisted, that as the justices might imprison, the confinement must be understood to be in execution of that authority, and a satisfaction of the condition of the recognizance.

Caldecott, on the other side.--To be a satisfaction of the conviction, the confinement must be in pursuance of the powers invested in the magistrates. But even if the Court of Quarter Sessions had the power of imprisoning at all, yet it can only be a power similar to that of the justice from whom the appeal is made, *viz.* to commit for three months, without any discretion to shorten the time. Then a confinement for two days could not be in execution for this offence.

But the justices have no power to imprison at all. The original order of the justice must always be merely for the payment of the penalty; and the only order the justices at Quarter Sessions can make, is to affirm or quash that order. The reason of allowing the justices originally to distrain on non-payment, and to imprison for want of distress,

is to secure some punishment of the offender, if he cannot pay the penalty. But on the appeal, the payment of the penalty is secured by the security taken. Accordingly, no such power is given the justices at Quarter Sessions to distrain or imprison for non-payment; and it cannot arise by implication. Then a recognizance to pay the penalty is the same thing in effect as a recognizance to abide the order, for that is the only order that can be made.

The Court thought, that the confinement could not be referred to the sentence as a satisfaction of it, not being in pursuance of the power vested either in the justices or the Quarter Sessions. But they held that, by the act, the alternative was given to the justices either to direct payment, or, in case of non-payment, to confine the defendant for three months. The recognizance not pursuing the act, but confining the condition to one of the alternatives, is bad.

The order was granted.

Same day.

WHITTINGHAM v. BURGOYNE.

THE bill stated, that the plaintiff was a cornet in a fencible regiment of cavalry, of which the defendant was colonel; that the defendant, alleging he had a right or power of selling commissions, agreed with the plaintiff to promote him to the steps of lieutenant and captain for 260*l.* for which the plaintiff gave him a bill of exchange; that the plaintiff,

soon after his promotion, was illegally deprived of his commissions by the defendant; that taking money for commissions in such regiments was contrary to the King's orders; and that the defendant had accordingly not returned the said commissions to the War-Office, as obtained by purchase, according to the practice, where they may be sold. That the defendant had put the draft in suit, and the money was in the sheriff's hands in execution. The bill prayed an injunction, and return of the money levied, and the draft to be delivered up to be cancelled.

The defendant demurred generally.

Plumer and King, in support of the demurrer.— There is no equity to support the case. The transaction, if illegal with regard to the public, was fair as between the parties. The plaintiff obtained his commission; it is not equitable to refuse to pay the stipulated price.

The plaintiff comes too late. Equity does not interfere to direct repayment of money paid upon illegal contracts, or to rescind rights already vested. The party must contest the matter in the proper stage. If the defence can be set up at law, and the party allows judgment to go, he has lost his opportunity of disputing it. The claim, whether legal or not at first, is then vested, and is to be considered as if the money had been paid. A contrary doctrine would have this inconvenience, that in those cases where courts of equity generally content themselves to assist the defence at law, if the defendant there lets judgment go, he compels this

Court to take the whole upon itself, or to direct an issue to try that which has been already decided at law.

By the money being levied, it is in fact paid. The sheriff is agent for the plaintiff at law, and has it in his hands. If this Court will not interfere where the money has been paid, much less ought it to allow the misconduct of an agent in retaining the money of his principal, or of a sheriff in keeping money in his hands, which, by the rules of the Court, he ought to have paid, to alter the rights of the parties.

The discovery sought is a transaction stated to be contrary to the rules of the army. It is, therefore, such a discovery as will necessarily subject the defendant to penalties for breach of those rules.

Plumer mentioned a case in this Court, where a bill was filed for discovery, whether the defendant had not extorted from the plaintiff a larger sum upon the sale of a commission in the army, than the regulated price, fixed by the articles of war; and the Court held they could not compel such a discovery, as it necessarily subjected the defendant to penalties.

Piggot and Harvey, for the plaintiff.—The ground of equity is, that the defendant was taking money for his recommendation to the King's favor; and whatever the nature of the office may be, that is such an offence against public policy as calls on a court of equity to interfere, to prevent the recovery of the money stipulated. It is against conscience in the defendant to receive the money, or to take any step to obtain it; and therefore he may

be stopped by injunction in any stage. It is as if the draft had been obtained without any consideration.

It does not appear from the bill, that the defendant is liable to any military penalties for this offence; that ought, therefore, to have been introduced by a plea, if meant to be relied on. But the demurrer is general, for want of equity, and at least the demurrer ought to have expressed this particular objection to the discovery.

THOMSON, Baron.—Where the bill is for discovery and relief, and the defendant demurs generally to both, I apprehend it is a demurrer to the relief as principal, and to the discovery as consequent to it. Then an objection applicable to the discovery alone is not competent upon such a demurrer.

The case stood over till this day.

MACDONALD, Chief Baron (after stating the case.) —The defendant insists that there is no equity against him in favor of the plaintiff, because having had the thing stipulated, he ought to pay the price fixed for it. He also relies on the liability to military penalties as a sufficient reason to save the disclosure required; but the shape of his defence, general demurrer, will not allow that ground to be taken; which could only cover part of the discovery sought. With regard to the transaction itself, the plaintiff impeaches it from the beginning, insisting that the defendant had no right to sell that for which he exacted a price. The recrimination upon the

plaintiff, that he was *particeps criminis*, does not apply in those cases where public policy requires our interference to check vicious practices. The principle of this jurisdiction is very fully discussed by Lord *Hardwicke*, in *Lord Chesterfield v. Janssen*, (2 *Vez.* 156. 1 *Atk.* 352.) by Lord *Talbot*, in *Law v. Law* (*Forrest.* 140.), and by Lord *Thurlow* in *Haneington v. Du Chatel* (1 *Bro. R.* 124.), which establish the rule not only as to offices comprehended within the statute *E. 6.* but to all public offices, the practice of taking money for recommendation to offices being held, like marriage-brokers bonds, publicly detrimental. The case of *Morris v. McCulloch* (*Ambl.* 432.) is more exactly similar to the present; being upon the procuration of a commission in the marines, and there the money actually paid was ordered to be refunded.

These cases clearly establish the rule, that where a man sells his interest to procure another an office of trust or service under the crown, it is a contract of turpitude, and cognizable by the jurisdiction of equity.

The objection to the discovery sought, as to the consideration of the draft, cannot be taken upon a general demurrer which covers the whole demand.

The demurrer was over-ruled.

WILKINSON, Executor, v. CAWOOD.

ACTION of *assumpsit*.—The only count maintained by the plaintiffs was that for money had and received to their use. The plaintiff's testator died in *October* 1793. The defendant, his widow, received after his death the rents of four leasehold houses of the testator, up to 29th *September* preceding his death; two of these houses, in *Duke-street, Mary-bone*, were held under one ground landlord, and the other two, in *St. Pancrass* parish, under another. To cover the demand of the plaintiff, for the rent received by the defendant from the tenants, she brought evidence that both the ground landlords had applied to the tenants in possession for the ground rents, who had referred them to the defendant, and she thereupon paid their demands, which covered respectively the demand of the plaintiff for each estate. The ground rent so paid for the *Duke-street* houses was due at *Lady-day* 1790.—That for the houses in *St. Pancrass* was from *Lady-day* 1793 to *Lady-day* 1795. The portion of the latter, due before the death of the testator, being less than the rent received by the defendant from that estate. Upon this evidence being offered, the counsel for the plaintiff objected to its being received, on the general ground that the defendant was not entitled to set up any such payments.—The Lord Chief Baron admitted the evidence, and directed a verdict for the defendant, reserving the point for the opinion of the Court. The defendant ac-

If a stranger receives rent due to the testator in his lifetime, and afterwards, by desire of the tenant in possession, pays the demand of ground rent, due at the same time, for the same premises, he may deduct such payment in an action by the executor for the rents received. But not a payment of ground rent arising after the death of the testator.

cordingly stopped in the production of other discharges she meant to have set up.

A rule having been obtained to shew cause why the verdict should not be set aside, and the *postea* delivered to the plaintiff, cause was shewn by

Plumer and Peake.—By the form of action, the defendant is admitted to have been the agent of the plaintiff for the receipt of those rents, and must therefore be so considered throughout; *Smith v. Hodgson*, 4 Term Rep. 211. *Hitchin v. Campbell*, 2 Blackst. R. 327. *Jestons v. Brooke*, Cowp. 793. *King v. Leith*, 2 Term R. 141.; and in this equitable action only the true balance due is demandable. *Dale v. Sollet*, 4 Burr. 2133. and *Moses v. Macfarlane*, 2 Burr. 1012. But against a bailiff only the clear balance constitutes the demand, and all payments made in the usual nature of the business, even without any particular order, are first to be deducted. 1 Roll. Abr. 125. pl. 8, 9. 126. pl. 1. F. N. B. 266. Co. Litt. 126. a. The defendant is in the same situation as any other bailiff in that respect, *Hill v. Stowell*, 1 Cha. Ca. 126. *Ayne v. Ayne*, 1 Cha. Ca. 33. and as executrix *de son tort* she would be entitled under those cases to retain all payments made by her, by which the estate is not damnified.

Considering the defendant as a mere disseisor, she is entitled to have the sum paid, for the plaintiff recouped in damages. *Whitehall v. Squire*, Carth. 103. per Holt, Ch. J.

But she is entitled to be considered as agent for the tenants in possession. They referred the ground landlord to her for payment, and she having their rent in her hands, paid the ground rent out of it by their direction, and as their agent. It is clear that such payment must be allowed to them. *Sapsford v. Fletcher*, 4 Term Rep. 411.

The only difference between that case and the present is, that there the tenants were threatened with a distress. Here a demand was made by one who had a power to distrain, and that is sufficient to warrant a payment by the party liable to be compelled.

Rouse, Dauncey, and Wigley, in support of the rule. By this action we admit the agency for the purpose of receiving the money and paying it over to the plaintiff, like the agency of a banker, but not a general agency to pay all our debts. The moment the rent was paid to the defendant, the transaction was closed.

The tenants having paid their own rent, would not have been entitled to pay the ground landlord, unless compelled, or unless they had given notice to the plaintiff, their immediate landlord, and he had refused to pay it. Such a payment by them would have been merely voluntary, and would not have entitled them to deduct the amount out of the growing rents, much less to have maintained an action to get the money from the plaintiff; and the case of *Sapsford v. Fletcher* turned upon that distinction, of its being a payment by compulsion. The payment by the defendant was clearly voluntary. She was merely in the character of a banker, holding

the money of the plaintiff: and it must be argued to this extent, that every banker is entitled to discharge himself by voluntary payments of debts due from his creditor. *Plowd.* 282. *b.*

The payments in respect of the different estates cannot be blended together. The ground rent paid for the houses in *St. Pancrass* was mostly due after the death of the testator, and therefore cannot be deducted from or in any manner set off against, the rents due to him in his lifetime. The executor was entitled to these rents, for the general purposes of administration, and might have been obliged to pay other demands prior to the subsequent arrears of ground rent, as judgment debts; for rent is to be ranked with specialty debts only. 1 *Roll. Abr.* 997. 1 *Off. of Executors* 146. The tenants in possession could not have deducted the payment of ground rent, due after the death of the testator, from their rent due before it; nor could the executors have pleaded the liability to such subsequent ground rent to an action against them; but the rent received from the tenants, due in the testator's lifetime, would be assets in their hands not subject to that deduction. Then the interference of the defendant, a stranger, cannot put her in a better situation than either of the parties themselves would have stood in.

Plumer insisted that this distinction from the dates of the several demands, not being taken at the trial, but the single point reserved being that applicable to the whole ground rent paid, no other question could now be raised.

THOMSON, Baron.—Any argument arising from the facts reserved is competent.

MACDONALD, Chief Baron.—The single question reserved at the trial was, Whether, in point of law, the defendant could set up any payments of ground rent against the receipts of rent by her? The counsel on both sides then calculated the sums due reciprocally, and it was agreed upon the calculations made, that the result of the balance on either side would depend upon that question. As to which it seems decided by the case of *Sapsford v. Fletcher*, in K. B. Mr. Justice *Buller* there considers the rent payable by the tenant in possession as virtually consisting of two parts, the rent due to the ground landlord, and that due to the intermediate landlord; then being in its nature so divisible, it continued to be so in the defendant's hands; and a payment to the ground landlord of the portion due to him, is a discharge *pro tanto* and a payment to the intermediate landlord.

But it now turns out, upon the facts before the Court, that a material distinction had escaped the observation of us all. A great part of the sums paid by the defendant, on one of the estates, accrued due after the death of the testator, and undoubtedly that cannot be deducted from this demand. They are debts of different natures. The sum due to the testator was payable, at all events, for the benefit of his estate; and it was optional in the executor to have renounced this lease, if disadvantageous, upon a deficiency of assets. By continuing to hold, he is personally answerable. The demands cannot in any

shape be confounded, or the one set off against, or deducted from, the other. But as this point was not discussed at the trial, and the defendant's counsel abstained from giving evidence of other payments in discharge, upon the faith of the calculations then agreed to, by which it was supposed that the whole depended upon the general question of the admissibility of evidence of any payment of ground rent, it would be unjust that they should now be precluded by this mistake from going on with their case.

The Court are therefore of opinion that a new trial should be had.

FAWCETT and Another v. GEE.

Where a creditor apparently accepts and gives a receipt for a composition, in order to enable the debtor to deceive his other creditors, but takes a security for the rest of his demand, such security is void, although there is no joint agreement among the creditors, nor any one is in fact deceived by the fraud.

IN 1787, the plaintiff, being indebted to the defendant and several other persons, agreed with all his creditors to assign his effects to trustees for their general benefit; the assignees undertook to pay, and did pay, 10s. in the pound, and the plaintiff gave his notes, at twelve months, for the remainder; his effects turning out unproductive, he was unable to pay these notes, and was sued by several of the creditors; among others by the defendant, who commenced his suit, and arrested the plaintiff, in 1791. Thereupon the friends of the plaintiff proposed to all his creditors a second composition, viz. to enable him to pay 2s. 6d. in the pound, in considera-

tion of a complete discharge, and on condition of all the creditors concurring in it. The defendant answered this proposal, 6th *January* 1792, and in his letter demanded payment of the whole; adding, "he (the plaintiff) may do this with great safety to himself, provided the transaction be concealed from his other creditors."—On a second application he again wrote, on 16th *January* 1792, proposing to accept the following terms:—"On receiving 2s. 6d. in the pound, and his full costs, he will deliver up to Mr. *Fawcett* his note of hand, provided, at the same time, he and some one of his responsible friends will give security for payment of the residue of the money, as soon as Mr. *Fawcett* has paid the dividend to and settled with his other creditors: this circumstance may easily be concealed from them, for if Mr. *Fawcett* produces to them Mr. *Gee's* note, they will in course conclude the transaction with him to be settled."—These proposals not being immediately complied with, the defendant went on with his suit; the plaintiff filed a bill in this court for an injunction, which was dismissed, and the defendant again proceeded at law, till the month of *January* 1793, when the plaintiff *Fawcett* procured the sum requisite for the payment of 2s. 6d. in the pound, and entered into a bond for the remainder of the debt, with the plaintiff *Bunyan* as his security. The defendant thereupon delivered up the note, indorsed thus, "Received a dividend of 2s. 6d. in the pound on this note, on the within sum of "248l."—It was proved that, about the same time, the plaintiff had gone round to all his creditors, had represented to each that all were ready to accept, and that most had accepted, the said compo-

sition of 2*s.* 6*d.*; and by means of such representations he prevailed on all to give up their notes. One or two others besides the plaintiff had in truth received more than the composition of 2*s.* 6*d.* It did not appear that the indorsement on the defendant's note had in fact been shewn to any creditors, to induce them to agree to the same terms. The greatest part had settled with the plaintiff before the defendant; a few after him. The mode of settlement with all was merely the cancelling the notes of each, without any deed or release. The bond given to the defendant becoming due in *November* 1793, he put it in suit; this bill was filed for an injunction, and to have the bond delivered up to be cancelled. An injunction was granted and continued to the hearing.

Piggott and *Kyd*, for the plaintiffs, insisted on this being within the common rule, established in many cases, both at law and in equity. *Smith v. Bromley*, *Dougl.* 696. (n) *Lewis v. Chase*, 1 *P. W.* 620. *Middleton v. Lord Onslow*, 1 *P. W.* 769. *Clarke v. Shee*, *Cowp.* 200. *Cockshot v. Bennet*, 2 *Term Rep.* 763. *Jackson v. Duchaire*, 3 *Term Rep.* 551. *Jackson v. Lomax*, 4 *Term Rep.* 166. *Butler v. Rhodes*, *Peake's Ca. Ni. Pri.* 238. *Cecil v. Plais-tow* (*ante*, vol. 1. p. 202.)

Plumer and *Fonblanque*, for the defendant.—The cases shew that the whole matter may be investigated at law, and where the jurisdictions are concurrent, the priority of the suit at law ought to prevail.

The plaintiff ought to come into equity with clean hands. In *Small v. Brackley*, 2 *Vern.* 602.

the Court held that the fraud of the debtor took from him the benefit of this rule of equity, in a case much stronger than the present. Here he has habitually deceived both the defendant and all the other creditors, by misrepresenting to each the readiness of the others to accept the composition. In truth, several never intended, nor did accept it.

The transaction which took place in 1793 cannot be connected with the preceding negotiation in 1792. It was notorious to all the creditors that that negotiation terminated, for the defendant went on with his suit for a year after it.—That was a negotiation for a discharge by a deed, conditioned to be void, if all the creditors should not come in; but the transaction in 1793 was merely a discharge by giving up the security, without any condition at all.

There is nothing to shew that in the latter transaction the defendant had any view to deceive the other creditors, for they were not parties to it. The only circumstance to be adduced against him is the indorsement on the note; but that is no more than a receipt for the sum actually received.

The cases have been upon compositions by all the creditors jointly, and in most of them there has been an express proviso to make the composition void, unless all should come in. But where each creditor is making his separate private bargain with the debtor, as in the present case, there seems to be no reason why it should not be done in whatever manner they can agree. The existence or deliver-

ing up the defendant's note is not more notorious than the giving the bond to secure payment. There is no such joint transaction of the creditors as gives each a right to know the demands of the others and the satisfaction made to them.

MACDONALD, Chief Baron.—(after stating the case.)—It is observable that the proposal to conceal the transaction comes from the defendant, and the creditor therefore stands much more favourably than if he had suggested the concealment, and had afterwards come here to take advantage of it.—But the defendant goes further in his second letter, he not only proposes to conceal the real transaction from the other creditors, but offers to enable *Fawcett* to impose upon them by producing his note and a receipt for the composition. As soon as the plaintiff found himself enabled to accept this proposal, it was carried into effect, and the indorsement on the note can have no other meaning than the purpose of misleading the other creditors.

It appears that most of the creditors settled with the plaintiff before the defendant did; but that is not material. The defendant authorised the plaintiff to hold out to the others that he was ready to accept the composition. And it is of no consequence whether any of them were actually induced to come in by such representations, or by the production of the receipt. The principle is, that in such cases each must conduct himself openly, and in the manner in which he appears to the world to act. If his conduct is such as has a natural tendency to induce the other creditors to believe that all are acting upon equal terms,

and receiving equal shares, as they may be influenced by that appearance, any private agreement for greater benefit to one, is a fraud upon the rest, and therefore void. The present case seems to fall exactly within the cases in which this principle of equity has been administered.—*Middleton v. Onslow*, *Cockshot v. Bennet*, *Jackson v. Lomax*, *Lord Chesterfield v. Janssen*, define the principles of the rule with great accuracy.

The Court decreed a perpetual injunction, and the bond to be delivered up.

HALL, Clerk, v. MACHET and Others.

Same day.

THIS was a bill for tithes. One of the defendants, *Kerryson*, had built a new water-mill a few years before the time for which the bill sought an account, at the expence of 820*l*. He lived in a neighbouring parish.

A water mill is titheable as a predial and local tithe in respect of the person to whom it is due, but as a personal tithe in the mode of accounting.

Plumer, *Stanley*, and *Grimwood*, for the defendant, argued that this was a personal tithe, and therefore due to the rector of the parish in which the defendant resided. 2 *Inst.* 621. 3 *Bulst.* 212. 1 *Rol. Rep.* 405. *Cro. Jac.* 523. 4 *Mod.* 215. *Dodson v. Oliver*,

The tithe of the clear profit being only due, the rent is the first deduction; and in the case of a new mill in the occupation of

the owner, a yearly value, in the nature of a rent, is to be set upon it and deducted;

A farmer may cut down a field in any portions most convenient, provided he sets out the tithe of all then cut down, before any is carried, and provided it be not done vexatiously.

Bunb. 73. *Chamberlayne v. Newte*, 1 *Eq. Ca. Abr.* 366. 9 *Vin.* 40. and 1 *Bro. P. C.* 157. *Carlton v. Brightwell*, 2 *P. Wms.* 462. *Donalt v. Lowther*, 2 *Barnard. K. B.* 396. Another necessary consequence of its being a personal tithe, and so recognized in all these cases, is, that only the tenth part of the clear profits is due for tithes. And in *Chamberlayne v. Newte* it is expressly decided that the charges of building the mill are in the first place to be deducted. Those charges not being yet repaid, no tithe will be due to either rector.

Partridge and Bell, for the plaintiff, contended that at least for the purpose of deciding to whom the tithe was due, it was a predial tithe, payable *rectori loci*. *Gumley v. Folkingham*, 1 *Show. Rep.* 281. *Carth.* 215. 1 *Roll. Abr.* 641. The case of *Chamberlayne v. Newte* only decides, as to the mode and extent of payment, that it shall be computed as personal tithes are. That it is not a personal tithe in respect of locality is clear from this, that a modus for land covers a mill erected thereon. 2 *Inst.* 490. *Russel v. More*, 1 *Roll. Abr.* 651. *Talbot v. May*, 3 *Atk.* 18. *Laches v. Haine*, Exchequer, 18th December, 1783, and June 1784. That was a case where an exemption was claimed for the land, under an inclosure act, and the question was whether a mill newly erected was covered by the exemption. The Court held that it was; that the tithe of mills was a predial tithe, in respect of locality, although payable as a personal tithe in point of quantity (a).

(a) This case was mentioned by *Burton*, (*amicus curiæ*), who was counsel in it for the miller; *Mansfield* was on the other side: it came on upon a motion for a new trial.

As to the deductions to be made, only the annual expences can be claimed as such in any personal tithe. The defendant being the owner of the mill, no rent is paid nor can be deducted. *Chamberlayne v. Newte* was the case of a tenant (a).

The case stood over till this day.

MACDONALD, Chief Baron.—The principle upon which the tithe of mills depends, seems now clearly fixed by *Chamberlayne v. Newte* and *Laches v. Haine*, and the other cases: it is now settled that it is to be considered as a predial tithe, so far as regards its locality, and the person to whom it is payable; but in the mode of payment it is to be treated as a personal tithe.

With regard to the deductions to be made, before the plaintiff shall claim his proportion of the clear residue, considerable doubt has been raised. On the one hand it is said, very truly, that it would be an extreme hardship on the present incumbent, if the whole expences of building the mill were to be deducted out of the first profits, because that would probably take away his chance of ever being benefited by it. On the other hand, till some retribution is made for the original expence, we cannot begin to charge the miller with any thing as his clear profit.

(a) Searches were made, to discover whether in that case the rent was allowed as a deduction, in taking the account before the Master; but nothing appeared in the record from which it could be ascertained.

If the mill were in the hands of a tenant, it would be a very plain case. The tenant's clear gain is what remains to him after payment of rent and other expences; and in *Chamberlayne v. Newte*, that must have been one of the deductions.—Now, although this mill is in the hands of the owner, the same measure of justice is applicable to it as if it were in lease. It is capable of having an annual value or rent set upon it, and when that is ascertained, it may be deducted, as if it were rent actually paid. We shall therefore direct the Deputy Remembrancer to inquire and set an annual value or rent on the mill; and after deducting that rent and other incidental expences, of servants, &c. the defendant to account for the tithe of the clear profits.

Partridge suggested that the whole rent or annual value ought not to be deducted: rent of a mill is paid for two things, the water and the machinery; in many places the principal part of the rent arises from the value of the fall of water; that being the natural benefit arising from the freehold, is most properly the subject of tithes; the deduction ought only to be proportioned to the value of the machinery, as a recompence for the charges of erecting it.

The Court thought that it was necessary to have one general rule for all cases; that the whole rent must be deducted, as an expence, in the case of a tenant, and the same measure ought to be adhered to in the case of the proprietor.

Another point in the cause was this. One of the defendants occupying among other lands, a piece of meadow of nine acres, cut it down at four several times, and set out the tithes of each cutting separately, as it was cut.—He gave evidence that from the stocking of his farm, and other circumstances, particularly the danger of floods, this mode of husbandry was more convenient to him than to cut all at once. He gave notice to the plaintiff at each cutting.

For the plaintiff it was objected, that the cutting down so small a field at four cuttings, could only be justified from absolute necessity, as it gave so much trouble to the clergyman.

For the defendant was cited, *Erskine v. Ruffle*, 5 Bac. Abr. 74.

The Court held the rule to be, that all the hay cut down in a field at any one time must be tithed before any part of it could be carried away; but the quantity to be cut at each time was in the discretion of the farmer, unless there should appear a design to defraud or vex the clergyman, under the pretext of convenience to himself. As the mode of husbandry in this case was fairly accounted for, they held it well enough.



Monday,
29th May.

The KING v. The Inhabitants of St. GEORGE'S,
HANOVER SQUARE.

On the collectors of the assessed taxes not paying over, the parish is answerable to the crown for the amount.

THE collectors of the assessed taxes (*viz.* on houses and windows, and on servants, horses, and carriages, &c.) had become insolvent, and these taxes for 1787, 1788, and 1789, raised upon the parish, were not paid over.

The parish were accordingly returned *insuper* for all those duties.—A *distringas* went. The parish raised 587*l.* being the amount of the arrears of taxes on houses and windows. They obtained an order to shew cause, why they should not be at liberty to pay in that sum, and why the process against them in respect of the other duties, which they considered as personal taxes, should not be set aside.

Cause was now shewn by the *Attorney General* and *Richards*.

The *Attorney General* stated, that after the discussion of the matter in the case of the parish of *Wimbledon* (a) he had taken occasion to reconsider it; that the extent of the danger to the revenue, and the seeming clearness of the intention of the Legislature, made him retract the admission he had made in that case, and bring it again before the Court.

(a) See *ante*, p. 855.

The 25 Geo. 3. c. 43. as to these taxes, adopts the whole provisions of 23 Geo. 2. c. 3. which regulates the duty on houses. The re-assessment is one of the regulations for the “ assessing, raising, “ levying, and paying the duties (a).” And the only question that can be raised is, Whether the nature of the taxes is so different, that this provision for re-assessment cannot take place in regard to those contained in this act, and so comes within the exception of the act, “ as far as the said “ provisions are applicable thereunto ?”—But it is clear from the act, s. 25. that the parish is answerable, and this is the only way pointed out, in which they are to make good the deficiency.—There is no greater hardship on the persons keeping horses or carriages now, paying for the deficiency of these taxes in 1789, than that the present occupiers of houses should pay for the occupation of perhaps other persons, and even of a very different number of houses, at the same period.

Partridge and *Dauncey*, on the other side, argued that the clause for re-assessment was not applicable to personal taxes.

(a) It is to be remarked that the several acts for granting additional duties on houses and lights, and which all adopt the regulations of the 20 Geo. 2. employ the same expressions for that purpose as are used in this act 25 Geo. 3. See 31 Geo. 2. c. 22. 2 Geo. 3. c. 8. 6 Geo. 3. c. 38. 18 Geo. 3. c. 26. 25 Geo. 3. c. 30. It never was doubted, and by this motion it was admitted, that as to those duties the general words in the acts were sufficient to incorporate the whole provisions of the 20 Geo. 2. and among others that for re-assessment.

THOMSON, Baron.—By the 25th *sect.* the parish is made answerable to the crown. We cannot overlook that express enactment; and the point now disputed seems immaterial to the subject in its present stage. If there is no power to re-assess, the parish must be answerable in the common way; each individual is subject to the crown process, and must be reimbursed by a general parish rate. But that is a question for the different parishioners to agitate between themselves.

The case stood over till this day.

MACDONALD, Chief Baron.—The 25th *sect.* of the act contains a positive enactment, that the parish shall be answerable for its collectors. There is undoubtedly a hardship in the case, because by this act, the collectors are chosen by the commissioners, and the parish gets no security from them; but the enactment is positive, and cannot be got over.

The process of the crown is therefore regular in either case, whatever may be the mode of raising the money that is in arrear; that question will be for the different parishioners to discuss among themselves, and seems on both sides to present considerable doubts; but the process of the crown is regular, and the order must therefore be discharged.

MENTILL v. PAYNE and Others.

Same day.

ONE of the plaintiff's interrogatories was suppressed as leading.

An interrogatory being suppressed as leading, the Court, on the circumstances of the case, gave leave to exhibit a fresh interrogatory.

Burton moved for leave to exhibit a fresh interrogatory.

Hollist objected, that there was danger in such a practice, as the effect of the leading interrogatory must remain upon the mind of the witness; and it is possible that a party might put leading interrogatories at first, on purpose to produce this effect, and also, by seeing the depositions, to discover to what point to direct his second interrogatories.

The *Court* admitted the general danger of such a practice; but as the interrogatory suppressed went to the very gist of the cause, without which no part of the depositions could be understood, and as the question turned on fraud in setting out tithes, where any suspicion of an improper effect of this motion might be obviated by a trial at law, they granted the order.

SITTINGS AFTER EASTER TERM.

Thursday,
1st June.

JONES v. PRICE.

Where, by the terms of an auction, the sale is to be completed by a certain day, yet if neither party takes any step to quicken the other, till it becomes impossible to execute the agreement by the day fixed, the time is waived, and equity will interfere to prevent the purchaser taking advantage of it at law.

ON 22d *September* 1796, the plaintiff put up a certain estate to sale, by public auction. The defendant was the purchaser, and paid in 110*l.* (one-tenth of the purchase money) as a deposit.—By the conditions of sale, the rest of the purchase money was to be paid, and the conveyance made by the 25th of *March*.—Neither party took any step to quicken the other till the 23d, when the plaintiff's agent told the defendant it was the plaintiff's wish to have the contract carried into effect. Thereupon the defendant objected that no abstract of the title had been delivered; and added, that unless such abstract and all necessary deeds were ready to be delivered to him on the day stipulated, (the second day thereafter,) he would not go on with the bargain. That being then impossible to be done, he immediately brought an action at law to recover the deposit money. This bill was for an injunction, and specific performance.

Hart moved for an injunction, on the ground that time is not of the essence of such contracts, unless where the conduct of the parties shews that they mean so to consider it.

Richards, contra, insisted that time is of the essence of the contract, unless waived, either expressly, or by the conduct of the parties. *Pinke v. Curteis*, 4 Bro. Rep. 332. *Smith v. Burnham*, (*ante*, vol. 2. p. 527.)

MACDONALD, Chief Baron—There is no case which says that the mere neglect of executing the agreement at the very day shall alone avoid the whole agreement. Certainly the rule formerly adopted, that time should in no case be considered as of the essence of the contract, is too broad. It depends entirely upon the manner in which the parties themselves, by their conduct, shewed that they meant to treat it.

Here neither party moved, or intimated a desire that the matter should be immediately arranged. They treated the time therefore as immaterial. Then the defendant's coming, only two days before, to demand performance of a thing then impossible, and which his own conduct had led the plaintiff to suppose was not meant to be insisted upon, is a mere trick to get off from the bargain.

Richards. The deposit money ought at least to be paid into court, as in *Smith v. Burnham*.

The injunction was granted, the plaintiff paying the deposit money into court.

GARNONS v. BARNARD.

See vol. 1.
p. 296.

THE decree in this cause was reversed on appeal, by the House of Lords, and an issue directed.

In the House of
Lords, in Error,
from the Court
of Exchequer in
Scotland.

EDGAR and Others v. MILLAR and Another, in
Error.

The bounty
given by 26 G.3.
c. 81. on the
buss fishery for
herrings, is not
payable where
the buss lies in
port, and sends
out her boats
to fish.

THE plaintiffs in error (defendants below) were the commissioners of the customs in *Scotland*. The action was brought on the plea side of the Court of Exchequer in *Scotland*, for refusing to pay the bounty of twenty shillings *per* ton to the plaintiffs, as owners of a fishing buss, which had been employed three months in the *British* white herring fishery, according to the regulations of the 26 Geo. 3. c. 81. The cause came on in the shape of a bill of exceptions, tendered to the Court by the plaintiffs in error. The principal facts were

these. That the plaintiffs resided at *Starigo* in *Caithness*, and duly fitted out the vessel according to the act. The vessel was lying at *Wick*, two miles from *Starigo*, both of them being creeks of the port of *Thurso*; and after the clearing out, but before sailing, the crew proceeded daily in boats to try for herrings, but caught no considerable quantity. They returned each night to the buss in the harbour. She then sailed northward, intending to proceed to the West Highlands, but was driven back to *Starigo*; and the herrings then becoming plenty on that coast, she sent out her boats as before, and got a full cargo. It was admitted that in every other respect she had entitled herself to the bounty, if the mode of fishing, by sending out her boats, could be so considered.—It was proved to be a common custom in the fishery to run the busses into the creeks, while the herrings are plenty upon the coast, and the bounty had always been paid for such busses; the fishery must always be carried on immediately by the boats. The Court of Exchequer directed a verdict for the plaintiffs below, and gave judgment for them upon the argument of the bill of exceptions.

The *Attorney General* and *Solicitor General*, for the plaintiffs in error, maintained, that the buss had not complied with the act, in not having *proceeded to sea, and continued there*. They argued from the whole context of the act, and of the other statutes upon the subject, that this larger bounty was meant to be given to a fishery carried on at sea, while the smaller bounty is alone payable for the boat fishery from the shore; one great object of the Legislature

being to encourage navigation, by the number of vessels, and of seamen employed at sea: whereas this buss was merely used as a hut on shore.

Grant and *Adam*, for the defendants in error. The twenty shillings bounty is meant for the fishery upon the coasts. There is a higher bounty given by the same act to the "deep sea fishery." But the Legislature, in encouraging a coast fishery in busses, meant merely that such fishers should be able to follow the herrings to any part of the coast, not that they must always be at sea.—Such a fishery near the shore would be more dangerous, would require stronger vessels, and ought to have a larger bounty than the deep sea fishery. If it is meant as a coast fishery, the Legislature must contemplate the probability of the herrings coming into the arms of the sea, which are so numerous on that coast, and must have understood that the fishers would follow them there: but most of these are creeks or havens. Are the busses obliged to keep out at sea while the herrings are in the creeks? The circumstance of the herrings having come to the creek where this vessel was lying, cannot vary the case.—Throughout all these acts, the principal object is the enriching the country by the fish caught: A second is the encouragement of navigation. The first of these is attained by having a sufficient vessel, and free power to follow the herrings wherever they are in greatest plenty; the second object is also attained by having a vessel, and seamen fit to navigate her round the coast, if necessary: these men acquire seafaring habits, and are liable to be pressed as seamen for the navy. It cannot be the desire of the Legisla-

ture that either the vessel or the men should be exposed to unnecessary danger.

The words used in the act relate to the common case. In general, a vessel must "proceed to sea" for the fishery; but the principal directions of the act are, that they shall "proceed to the white herring fishery." When the herrings are in the creeks, a proceeding to sea would not be a proceeding to the herring fishery, but the contrary.

The *Lord Chancellor* observed, that the case came before the House in an unusual shape. It was an action on the plea side of the Court of Exchequer in *Scotland*; a jurisdiction which the House had probably never before had occasion to consider. The form of the proceeding was also singular, the facts and evidence being put in the shape of a bill of exceptions to the directions of the Judge, which would more properly have been the subject of a demurrer to evidence: but as the parties below had not taken any objection either to the jurisdiction or to the form of proceeding, and as it was of considerable public importance that the real question between them should be settled, his Lordship proposed to the House to refer to the opinion of the Judges (by whom they were attended) the general question, Whether, upon the facts stated in the record, the defendants in error were entitled to claim the bounty of twenty shillings *per* ton on their vessel?

The Judges present (*viz.* the Lord Chief Baron, *Buller*, Justice, *Thomson*, Baron, and *Lawrence*, Justice) having consulted together,

MACDONALD, Chief Baron, delivered their unanimous opinion, that the defendants in error had not shewn themselves entitled to the bounty claimed.

If we consider the nature of the bounty offered by this act, we must perceive that the Legislature, anxious to encourage this fishery in every way, has held out several different premiums to encourage persons to enter into it; and those premiums are proportioned to the expence, labour, and hazard of each adventurer, being the reward of having employed them in an undertaking beneficial to the public.

If the expence, labour, and hazard are proportioned to a boat fishery from the shore, the smallest bounty is allowed; if they are proportioned to a fishery by a vessel of fifteen tons or upwards, a larger bounty is given; but if proportioned to a vessel standing the hazard of the weather in the deep sea fishery, the bounty is increased accordingly. The candidate for either bounty must shew that he is in the predicament which entitles him to claim it according to the directions of the act, and any practice which may have prevailed contrary to the act cannot avail him.

The party here claims the bounty of twenty shillings *per* ton on his buss, and he must shew that he came within the regulations which entitle him to that bounty. The bounty of twenty shillings is given for a description of vessels capable of standing out from the shore, and which throughout the whole of the act are evidently considered as being

obliged to be at sea during the time they are entitling themselves to it. They are to be *decked* vessels, of not less than fifteen tons (*s. 1.*); are to “*proceed on the fishery, and continue there,*” until their “*return to port,*” (*s. 2.*) They are to proceed *from* the place where her owner resides “*on the said intended voyage,*” (*s. 3.*) The faithful conduct of the master and crew while at sea, and away from the inspection of the officers, is secured by an oath, and, by security given, (*s. 4.*) On her “*return*” into port, she is to have a certificate mentioning the “*port*” from which she “*departed.*” —The intention of the Legislature is perfectly clear, that the vessel, in order to entitle herself to the bounty, must proceed to the fishery at sea, and the claimant must shew that he has complied with that as well as the other requisites of the act.

Here the vessel was regularly fitted out according to the directions of the act. There was also a fair intention to have complied with all the other requisites of the statute: for the vessel actually commenced her voyage towards the West Highlands, and was driven back: before the weather permitted her to resume her voyage, the herrings became plenty on the coast, and the defendants gave up their intended voyage, let the vessel continue in harbour, and carried on a fishery by their boats from the shore, till their cargo was completed. They intended to have acted in such a manner as would have entitled them to the larger bounty, but upon the subsequent accidents intervening, this intention was abandoned, and they preferred that sort of

fishery which entitles them only to the lower bounty. By so doing they saved the labour and hazard of a fishery at sea, and must content themselves with the bounty applicable to the diminished labour and hazard they actually incurred, in a boat fishery from the shore.

Thereupon their Lordships ordered the

Judgment to be reversed.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF EXCHEQUER;

IN

TRINITY TERM,

37 GEORGE III.

St. JOHN *v.* CARGILL and APTHORPE.

Friday,
16th June.

THIS was a bill for an account and injunction against an action brought by the defendants.

An injunction was obtained, upon an attachment against *Cargill*, supported by an affidavit, stating him to be abroad, and confirming the material allegations of the bill. On the same day *Apthorpe* had filed his answer.

Afterwards, at the sittings after last term, *Grant* moved to dissolve the injunction. *Cox* objected,

that that could only be done upon the coming in of *Cargill's* answer, as the motion admitted the order to have properly issued. The objection was allowed.

Grant now moved to discharge the order for the injunction, and was proceeding to read the answer of the defendant *Apthorpe*, to shew that the plaintiff's own declarations rendered any answer from *Cargill* unnecessary. He relied on *Vandam v. Munro*, (*ante*, vol. 2, p. 502.)

Cox objected, that the answer of *Apthorpe* could not be read; that it could only be offered instead of an affidavit of the facts, but if an affidavit had been made, the plaintiff would have been entitled to answer it; by reading the answer against him, he would lose that benefit.

The Court were clearly of opinion that the answer could not be read, and

Refused the order.

GARDNER v. WALKER.

Tuesday,
20th June.

DAUNCEY moved to amend the declaration, the Christian name of the plaintiff having been mistaken in the process, and in all the proceedings.—The issue had been joined, and the record sent down, but, before the assizes, the mistake was discovered. He mentioned the cases, *Bondfield qui tam v. Milner*, 2 Burr. 1098. *Mace qui tam v. Lovett*, 5 Burr. 2833. to shew that amendments are allowed in this stage of the proceedings.

Where the name of the plaintiff is mistaken in the process, and in the pleadings, the Court will give leave to amend, while all is in paper.

Whether a misnomer of the plaintiff is a cause of nonsuit. 2u. 7

THOMSON, Baron.—It is done continually.

Walton objected that no amendment could be unless where there is something to amend by; here the whole is wrong. In the cases cited, the process was regular, and the mistake was in the declaration: there the cause was properly in court; here no cause between these parties exists.—The Court cannot make the defendant appear to a suit in which no process has issued against him, or transfer his appearance from one suit to another.

If any amendment could be, it must be in the same term.

This is a cause of nonsuit, for the plaintiff is bound to know his own name. If the defendant's name is mistaken, he must plead in abatement, and

then the judgment is *quod billa cassetur*, and the plaintiff must begin again: but if you can amend a mistake of the plaintiff's name, *à fortiori* you may of the defendant's name, and then the plea of misnomer never can exist.

MACDONALD, Chief Baron.—I do not feel the distinction you take. Every thing material to the cause, if mistaken, may be amended while the whole is in paper. My only doubt was, whether in this stage of the cause it were proper. I am now satisfied that it is.

THOMSON, Baron.—If the amendment had not been moved for, I very much doubt whether this would have been a ground of nonsuit. The objection might have been taken by a plea in abatement (a); and that seems therefore the proper mode to take advantage of it.

The rule was made absolute.

(a) See 1 *Com. Dig.* title *Abatement* (E. 18, 19, & 20.)

COWAN v. PHILIPS.

Friday,
23d June.

AFTER the exceptions were over-ruled, the defendant waited a fortnight, and then took out an order for three weeks time to put in a further answer, commencing from the day it was taken out.

Hart moved to discharge that order. He insisted that the defendant was only entitled of course to eight days, and, upon motion, might have three weeks, commencing from the allowance of the exceptions, so that the eight days would be reckoned as part of the three weeks.

Johnson on the other side.

Upon consulting the officers, the rule was found to be that the defendant is entitled to the order for three weeks time, to commence from the expiration of the eight days.

GOODTITLE on dem. LEON v. LONSDOWN.

Tuesday,
4th July.

THIS was an ejectment brought by a mortgagee, to get into possession of the mortgaged premises.

CASES IN THE EXCHEQUER.

The mortgagor, obtained a rule to shew cause why the action should not be stayed, and a writ was directed, on the defendant's bringing in the principal and interest, and paying costs.

Plaintiff shewed cause, and produced a notice by the plaintiff, that he insisted that other principal sums were chargeable upon the premises besides the mortgage.—He also produced an affidavit in support of the notice, which stated a trust created by both parties, for the sale of part of the estate, and some expences incurred in the execution of that trust. He insisted that these expences were chargeable upon the premises.—The amount of the sums insisted upon, beyond that due on the mortgage, was not specified.

Præd objected, that the notice should specify the nature and amount of the charges insisted on, that the defendant might consider whether he would admit and pay them, and that the Court might see whether there was any ground for insisting on such charges; for the statute would be nugatory if the mere indefinitely insisting on other demands would destroy its effect.—He considered the affidavit liable to the same objection, as to the sum demanded not being specified; and although the nature of the charge was mentioned, it appeared that the only claim was for the expences of a deed relating to the mortgage, which might therefore be referred to the Master, under the statute. He mentioned several cases in which the Court of King's Bench had inquired into the nature of the charges set up, before

allowing them as cause against such orders. *Skinner v. Stacy*, 1 *Wils.* 80. *Bingham v. Gregg, Barnes* 182.

Dampier contended, that this summary proceeding was only given where the parties were agreed as to the sum to be paid. If there is any question between them, it must go in the regular mode of proceeding.

MACDONALD, Chief Baron.—The Court are of opinion that the notice and affidavit are insufficient. It is necessary that the nature of the ulterior demand, and its amount, should be stated; for if the sum claimed is admitted, it is no longer an objection to the order being made, and the defendant must know the claim, otherwise he cannot admit it. Besides we are to see that a real demand is set up, of a nature which cannot be determined in this summary method, for if the mere insisting on further charges were sufficient, the intention of the act would be wholly defeated.—The only charge here specified is of a nature which may be very well settled by the reference to the Master.

Wednesday,
5th July.

The rule was made absolute.

4th July.

NICHOLS v. LEE.

Plea (to a declaration on a valid bond), that the plaintiff afterwards received usurious interest, is bad.

DECLARATION on a bond, which, upon *oyer* appeared to be conditioned for the payment of a principal sum, with lawful interest.—Plea, that after the execution of the bond, the plaintiff took and received from the defendant more than lawful interest for the money due. To this plea the plaintiff demurred.

Espinasse, for the demurrer, rested on *Pollard v. Scholey*, *Cro. Eliz.* 20. *Bulst.* 17. *Ferral v. Shaen*, 1 *Saund.* 294. and the cases in 5 *Bac. Abr.* 408. 412.

Onslow for the defendant. The mischief to be remedied by the statutes of usury will remain, if the lender can afterwards, by threatening a demand of payment, extort usurious interest at each yearly settlement, and yet retain a legal security for his principal.—The statutes avoid all securities “where—
“upon or whereby there shall be reserved or
“taken” more than legal interest: and Lord *Hardwicke* holds that this would avoid a mortgage. 3 *Atk.* 154.

MACDONALD, Chief Baron.—There is nothing more settled than this point. To avoid a security as usurious, you must shew that the agreement was illegal from its origin.

THOMSON, Baron. — Lord *Hardwicke* never could have meant to lay down the proposition that is reported in *Atkins*.

The demurrer was allowed.

WALKER v. WEBB.*

5th July.

THE defendant had been party in a cause in C. P. which was referred, under a rule of the court, to arbitration.—The arbitrator lived in the Temple, and the defendant went to a coffee-house in the *Strand*, to be ready to attend the arbitrator, if called for. While waiting there, he was arrested by process issuing out of this court.

A defendant arrested by *quo minus*, while protected by the privilege of C. P. as a suitor there, may be discharged by either court.

Best moved to discharge him on common bail.

The Court at first doubted whether it were not more proper to apply to the Court of Common Pleas, as the defendant had at the time the privilege of that court: but, on consideration, it was held that either court might discharge him, and they

Granted the rule.

SITTINGS AFTER TRINITY TERM.

Serjeant's Inn
Hall.
Tuesday,
18th July.

CHAPMAN v. BEARD.

Fifteen years
possession of a
benefice is pri-
ma facie evi-
dence of a re-
gular induction,
and of reading
the thirty-nine
articles.

Payment of
tithes by the
defendant, a pa-
rishioner, is
prima facie evi-
dence against
him of the rec-
tor's title.

THIS was a suit for tithes. The defendant in his answer denied the title of the rector, and insisted that he had not been regularly inducted, and that he had not read the thirty-nine articles.—The plaintiff had been fifteen years in possession, and had received tithes from the defendant. No evidence was given of any ceremony of actual induction having taken place; but it was proved that upon the plaintiff's taking possession of the benefice, the bells were rung by his order; the defendant's witnesses severally proved, that they had *generally* attended divine service for the two months immediately after the plaintiff's becoming rector, and that none of them had heard him read the thirty-nine articles, or had heard of his reading them. No evidence was given that he had *ever* read them.—The defendant had paid tithes to the plaintiff for several years.

Richards and *Short*, for the plaintiff, relied on *Bevan qui tam v. Williams*, 3 Term Rep. 635. (n) *Monke v. Butter*, 1 Rol. Rep. 83. *Watson's Cl. Law*. 652, *Gibs*. 817.

Romilly and *Benyon* on the otherside. Induction is a necessary part of the title of the plaintiff, and is the seisin at common law. Possession without it is tortious and voidable; the plaintiff therefore must prove it. *Buller's Ni. Pri.* 105. and the cases there cited: 1 *Sid.* 220. &c. The particular form is not material; but unless the Archdeacon, or other ecclesiastical officer, has given corporal possession of the benefice, there is no title.

In the case of *Powel v. Milburn*, 3 *Wils.* 355. it was solemnly settled that the having read the thirty-nine articles by a parson is presumed, unless evidence is adduced to destroy that presumption. It is impossible for the defendant to prove the negative, that the plaintiff never did read the articles; but evidence of several persons regularly attending church, during the first two months, and who did not hear him do so, throws upon him the necessity of proving the fact.

MACDONALD, Chief Baron.—It is a very singular attempt, after fifteen years possession, acquiesced in by the defendant himself, to require the rector now to prove the fact of his induction.—There is no regular ceremony required for that purpose, and there is therefore no presumption of any evidence of it now existing. There is indeed proof of some formal seisin having been taken, by the ringing of bells and the like; but the best evidence of induction at such a distance of time is the possession for fifteen years under it.

As to the other point, I perfectly agree to the rule laid down by Ch. J. *De Grey*. But here you

shew no evidence to shake the legal presumption in favour of the incumbent. No doubt is raised. You have not shewn that any witnesses attended all divine service on each Lord's day for two months after the plaintiff's induction, and deny his having read the articles during that time. The circumstance of these witnesses not having heard him do so on those days when they happened to attend, is nothing, unless you can answer for each time that divine service was performed in the two months.

HOTHAM, Baron.—There is a strong presumption of both the facts in dispute, from the acquiescence of the parishioners, and of the defendant. If there is any want of title, they should have complained to the Bishop, or disputed it, while the memory of the thing was fresh. There is no record nor repository for the evidence of induction, or of reading the articles; and the witnesses cannot live for ever. If these facts are not to be presumed from length of time, that circumstance which strengthens all other tithes will serve to weaken or destroy this.

THOMSON, Baron.—The circumstance of having himself paid tithes to the plaintiff, is *prima facie* evidence of the title against the defendant. It was so laid down by Lord *Kenyon*, and *Buller*, Justice, in *Radford v. Mackintosh* (a), and confirmed by the case there cited. I perfectly agree in the doctrine there held.

The defendant was decreed to account with costs.

(a) 3 Term Rep. 635.

LORD PETRE v. BLENCOE and Others.

Thursday,
20th July.

THE plaintiff, as impropriate rector, claimed tithe in kind of the defendants' lands in the parish of *Mounnessing*, or *Gynge Mounteney*, in *Essex*, being the demesne lands of an ancient monastery, of the *Augustine* order, of *St. Leonard of Thoby*. The defendants claimed to hold exempt from tithes. The monastery of *St. Leonard* was situated within the present boundaries of the parish, and the rectory had from a very early period been annexed to it. It was dissolved in 1524, by a bull from the Pope, and all the possessions vested in the crown. In 17 *H. 8.* that King granted to Cardinal *Wolsey* the manors and lands of *Thoby* and *Gynge Mounteney*, and also the rectory of *Gynge Mounteney*; after his attainiture, the manor of *Thoby* was granted in 22 *H. 8.* to Sir *R. Page* for life; and in 31 *H. 8.* the same subjects were granted, in reversion, to one *Berners*, under whom the defendants derived title; the grant included the scite of the priory, with the church of *St. Leonard of Thoby*, the belfry, church-yard, &c. (not mentioning tithes,) with all other lands and hereditaments of the monastery in *Thoby*. In 30 *H. 8.* the rectory of *Gynge Mounteney* was granted for twenty-one years to one *H. Wentworth*, including the "tithes of the demesne lands of the late monastery." In 37 *H. 8.* the rectory was granted to the plaintiff's ancestor, including "all the tithes of the demesne lands of the

Immemorial non-payment of any tithes from a district cannot raise a presumption of an exemption by grant from the lay-rector; but is strong evidence to explain the extent of the grant of the rectory, if at all doubtful.

“ same priory in *Gynge Mounteney*, late in the “ tenure of *H. Wentworth*.” No tithes were in fact ever paid for the demesne lands now in question, which were of very considerable extent; another part of the same demesne lands of *Thoby* had been decreed to pay tithes in a suit in this court in 1739; the only defence there set up having been the unity of possession of the tithes and land in the hands of the monastery. Tithes had been paid for that farm ever since.

The defendants rested their claim of exemption on several grounds.

1. That after such a length of non-claim, while the rectory was in the hands of lay-men, a conveyance ought to be presumed.

2. That the district of *St. Leonard* of *Thoby* was not parcel of the parish of *Gynge Mounteney*, but annexed to the church of *St. Leonard*, either as a separate parish, or as an extraparochial chapelry.

3. That the tithes of the demesnes of *Thoby* were vested in the monastery, by some title distinct from the rectory, and therefore were not conveyed to the plaintiff.

It was proved that the lands in question were now considered as lying within the parish of *Gynge Mounteney* (a), and there was no trace of their hav-

(a) In proving the parochiality of the demesnes of *Thoby*, some of the witnesses, whose depositions were read, appeared to be parishioners of *Gynge Mounteney*.

ing ever been otherwise, or of the existence of any parish or chapelry of *Thoby*, except from the mention of the church of *St. Leonard of Thoby*.

It was not clearly ascertained whether the monastery ever had any demesnes in the parish, as belonging to a manor of *Gynge Mounteney*, distinct from the lands in question, the demesnes of the manor of *Thoby*.

Burton and Piggott for the plaintiff. The parish must be supposed to have always been of the same extent as at present, unless some evidence is shewn to the contrary. The common law right of the rector must be presumed to cover the whole parish; and when we find him or his predecessors, the monastery, enjoying the titles of the whole, it must be referred to that general title, unless some particular distinct title to any portion be clearly established.

The existence of the church of *St. Leonard* is accounted for as a necessary appendage to the monastery, and does not afford any presumption of a distinct parish or chapelry.

The circumstance of the grant to the plaintiff conveying the tithes of the demesnes of the convent in *Gynge Mounteney*, distinct from the general grant

Romilly objected, that they were interested in the parochiality of these lands on account of the contribution to parish rates, and therefore not admissible to move the fact.—*The Court* held them admissible, not being interested in the subject of this suit.

of the rectory, is naturally accounted for from the unity of possession till then, in the hands of the monastery, of Cardinal *Wolsey*, and of the crown; when the tithes came first to be divided from the land, and capable of a separate perception, the grant, to prevent all doubts, has expressly mentioned them. There is therefore no fair inference that the monastery held these tithes by a title distinct from that to the rectory.

But supposing such an inference to arise, then, if the demesnes of the monastery in *Gynge Mounteney*, mentioned in the plaintiff's grant, mean the demesnes of *Thoby*, as lying within the parish, the tithes of those demesnes, the subject of dispute, are expressly granted to us. If the demesnes of *Thoby* are different from those mentioned in the grant, then the presumption of a distinct title to the tithes does not extend to them.

The conveyance to the defendant of the church, church-yard, belfry, &c. all connected with the church of *St. Leonard*, without mentioning the tithes, negatives any idea of these having been conveyed to him; and there is no evidence of any conveyances or transmission of the tithes of the demesnes, as a property in the defendant's family, distinct from the land.

If any such right ever existed, it could not merge, and the defendant, *Blencoe*, would be entitled to take the tithes from the other defendants, his tenants. He is setting up a counter title to

the tithes without any conveyance, or pernaney in any of his ancestors, to support such a claim.

The whole defence therefore resolves itself, in truth, into a claim of *modus in non decimando*, founded on the long non-claim of tithes; but it is clear that such a defence is bad. *Benson v. Olive, Bunb.* 284. *Charlton v. Charlton, Bunb.* 325. *The Corporation of Bury v. Evans, Com. R.* 643. *Nagle v. Edwards, ante, p.* 702.—In the two latter cases, the presumption of a conveyance from the lay impropiators was insisted on, but the Court held it to be only another mode of claiming a *modus in non decimando*, and rejected it accordingly.

Here the plaintiff's family being Roman Catholics, could not with safety stir any question with their neighbours, concerning tithes, and the length of non-claim is therefore no proof against them.

Partridge and *Romilly* for the defendants. Since the tithes which were vested in the different monasteries, came into the hands of laymen, they have been transferable like any other lay-property, and all rules of construction or presumption of such conveyances ought to apply to them; accordingly grants or conveyances of tithes have been presumed from length of possession; *Scott v. Airey (a)*, *Edwards v. Lord Vernon (b)*. The reason why a prescription *in non decimando* could not originally exist, was, because the incumbent could not convey the tithes, and therefore a conveyance by him could not be pre-

(a) *Vide ante, vol. 1. p.* 311.

(b) *Vide ante, vol. 1. p.* 312.

sumed from length of time, or any other evidence; but when the reason ceased to exist, the rule ought to have varied accordingly. Every thing which could be lawfully done shall, after long possession, be presumed. *Beadle v. Beard*, 12 Co. 5. the Mayor of *Kingston v. Horner*, Cowp. R. 102. 12 Mod. 181. *Sawbridge v. Benton* (a), otherwise the length of possession would be detrimental to the possessors, from the danger of the grants being lost or defaced. The cases which determine that such a presumption cannot exist against a lay-impropriator, may therefore deserve to be reconsidered.

But the present is distinguishable from those cases; in each of them only some particular species of tithes was disputed. But the presumption of accidental omission to collect, or of fraudulent subtraction of one species of tithes, is much greater, and the probability of a conveyance of it much less, than when the whole tithes of a large district have been immemorially withheld.

There is a great probability that the lands of *Thoby* were not originally a part of the parish, and that the tithes of that district were vested in the monastery by some distinct title. That lands might be so annexed to a parish, appears by *Seld. Hist. of Tithes*, c. 9. s. 4. and the express mention in the grant to the plaintiffs, of the tithes of the other demesnes, seems to imply such a separate title.—There is also some reason to suppose that it was originally a separate parish. For although the existence

(a) *Vide ante*, vol. 1. p. 372.

of the church of *St. Leonard* may be referable to the monastery, yet it may also be referred to an ancient parish or extraparochial chapelry, of which the memory is now lost. The fact of the plaintiff's ancestors never having demanded tithes from so large a district, can only be accounted for by supposing that it was known, for some reason now with difficulty guessed at, that the tithes of these demesnes were not included in the grant.

It is clear that the grant to the defendants, of all the *hereditaments* of the monastery in *Thoby*, would carry the tithes, if not before vested in the plaintiff.

Burton, in reply. The cases of *Bury St. Edmunds v. Evans*, and *Nagle v. Edwards*, did not go on the particular circumstance of only some species of tithes being there disputed, but upon the general ground, equally applicable to the present case, that the length of non-payment of tithes to a layman cannot be set up to prove, either a *modus in non decimando*, or a presumed conveyance equivalent to such a *modus*.

In all the cases where conveyances have been presumed, there has been actual possession to raise that presumption. Here the defendant has had no possession of the tithes.

The case stood over till this day.

MACDONALD, Chief Baron, in stating the case, remarked that the express mention of the tithes of the demesnes, after the general grant of the rectory and tithes, seemed to imply some peculiarity in the

title to those tithes which could not now be very clearly ascertained.—The mention of the demesne lands in *Gynge Mounteney* seems to apply to a manor there distinct from the manor of *Thoby*, and over which alone the grant of tithes to the plaintiff extended.

It is not at all explained why the tithes of these demesne lands were never claimed, till the suit in 1739 as to another parcel of them.—Lord *Petre's* family were not in fact during all that time under any disability to assert their rights; they were in very considerable power during the reigns of *H. 8.*, *E. 6.*, *Eliz.*, and *J. 1.* and his ancestor who was first ennobled, was Secretary of State under Queen *Elizabeth* and *J. 1.* and a protestant. The reason, therefore, of the tithes never having been demanded must be traced from other sources.

It is now established by many cases too firmly to be disputed, that mere non-payment is not, even among laymen, any answer to the demand of tithes. These determinations are perhaps to be lamented. I should have liked better to have found, in regard to tithes, the same principle of decision which regulates the title to every other lay-fee. If non-payment for any length of time forms no presumption of a grant of the tithes, then the length of enjoyment, which in all other cases is the best possible title, serves only to weaken the claim of exemption from tithes, as the difficulty of tracing its origin is increased. In the present case it is hardly credible that the plaintiffs' family have omitted, for above two centuries, to exert this right, from mere forbearance or negligence. Some other trans-

action probably took place between the parties, the memory of which is now lost. But the cases prevent us from deciding upon the ground of such a presumption.

Although length of time be not of itself a title against the rector, yet if there appear any circumstances which can raise a doubt as to the original extent of his grant, the immemorial non-payment must give infinite force to such circumstances.

Here it is not probable that the lands of *Thoby* were originally a separate district or parish; and the grants to the plaintiff clearly mark some particularity in the title to the tithes of the demesnes. The searches which have been made as to the original boundaries of the parish, and as to the manors spoken of in the grants, have not gone so far as perhaps they might. It rather seems that the grant applies only to the demesnes of a manor in *Gynge Mounteney* distinct from the manor of *Thoby*.— Under such peculiar circumstances, so little explained, and where the possession so strongly fortifies every doubt of the plaintiff's claim, we are of opinion that the case ought to undergo the investigation of a jury, where the whole may be more closely investigated, and every circumstance of evidence receive its proper weight.

The Court directed an issue, to try whether the plaintiff was entitled to the tithes of the lands in question.

Same day.

COLLYER v. HOWES.

Vide ante,
vol. 2. p. 481.

Clover hay is
titheable in the
cock, not in the
swathe.

THIS case came on for rehearing.

For the plaintiff, the same arguments were insisted on as at the former hearing. To prove that tithing in the swathe is improper, and that every sort of article must in some shape be separated into heaps, was cited, *Erskine v. Ruffle, Bac. Abr. title Tithes, (N), pl. 22.* where it was so determined as to barley. In *Franklyn v. Gooch, (ante, p. 682.)* it is established that the setting out tithes in such a shape that they may be compared with the nine parts, cannot be dispensed with, from any peculiarity of the weather, or of the mode of husbandry necessary in consequence of it.

The first stage in which the tithes can be separated from and compared with the nine parts, is the proper period of tithing, however late it may be. Thus hops, rape-seed, and other small seeds, are to be tithed by the tenth measure, after they have been carried home and separated from the stalk.

THOMSON, Baron.—That question, in regard to cloverseed, came on here in 1771, in the case of *Lloyd v. Bentley*. The Lord Chief Justice, then Mr. Baron Eyre, ruled at *Nisi Prius*, that it was titheable by the tenth measure, after being threshed out; but the Court determined that the mode of setting out the

tithes by measurement, while standing on the field, was good, and they granted a new trial.

The case stood over till this day.

MACDONALD, Chief Baron.—When this cause was before the Court on a former occasion, the evidence was not so fully discussed, nor the point so clearly illustrated as it has now been, and we are very happy in an opportunity to reconsider our determination on a subject of such general importance.

The broad question to be decided is, whether the tithe of clover can, according to the evidence before the Court, fairly and legally beset out in the swathe, or whether it must be set out in some later stage, when the article gets into the shape of cocks.

The first and strongest testimony is the *evidentia rei*; the utter impossibility of ascertaining, with any precision, the fairness of the tithe if set out in the swathe. If the field is irregular, the length of the swathes must be unequal, and the parties must measure every swathe in the field, to determine the fairness of the tithe.

On the former hearing, we decided for the defendant, on the ground that, according to the evidence then before us, clover does not in the usual course of husbandry get into the shape of a cock at all, but is generally carried immediately from the swathe. Upon the whole of the evidence now before us, we are satisfied that we were then mistaken in the fact;

that clover, in almost every case, is put into cocks, sometimes only before carting, generally in a much earlier stage.

It appears, indeed, that it is sometimes, though rarely, carried from the swathe; but this is so unusual that there is a contrariety of evidence, whether it is done in peculiarly fine or in remarkably bad seasons.

If it does not introduce a new and unprofitable mode of husbandry, this tithe must be subject to the general rule with regard to all hay. The general and irrefragable law of tithing is, that each article is to be tithed when it comes into such a state of severance that the parson may see whether he has his fair tenth. The stage of the process in which that object is best attained, marks the time of tithing.

This rule is analogous to that which prevails in other articles, similarly situated. The case of *Erskine v. Ruffle* applied it to barley. The tenant there tithed his barley in the swathe. This Court directed him to account for the value of the tithes as being improperly set out. They held, that the barley must be collected into heaps, not by any similarity to the mode of tithing corn or hay, but from the nature of the thing; that the swathe is not such a state of severance as enables the clergyman to see that he has his tenth, and the article must therefore be put into a proper state for that purpose, before the tithes can be set out.

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820

4. The plaintiff filed a bill in Chancery, and dismissed it after answer; he then filed another bill in the Exchequer for the same matters; the Court stopped his proceeding till the costs in Chancery were paid.

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" three daughters, 500*l.* each, to
" be paid them severally within
" five years after his decease, if

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- " then alive or any issue of their several bodies, to be paid by his son, the residuary devisee; the interest from his death at 4 per cent. for so many years as his son should keep it in his hands of the five years; but if there should be no issue living, from any of the daughters, at the end of the five years, then an annuity for life, of 20l. to be paid to them respectively; and the several sums of 500l. to be paid to them so dying without issue, should be equally divided between the survivors and their issue." One of the daughters died within the five years, leaving issue, and having previously assigned her interest. The assignee of the wife is entitled to the 500l.
- Oseland v. Oseland. Page 628*
2. Where a testator by his will devised the residue of his property to his daughters as tenants in common, and afterwards made a codicil expressly for a particular purpose, but thereby also re-devised the residue to his daughters, omitting the words of severance, the codicil was construed by the will, and they took as tenants in common.
- Mathews v. Bowman. 727*
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- Harrison's case. 836*

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Mutloe v. Smith. Page 709

2. In a bill of discovery to support an action brought for money won at play, it is sufficient to shew from the facts that an action lies on the statute, without stating the nature of the action brought.

Cowan v. Philips. 843

E.

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See EVIDENCE 1.

1. The vicar proved that he was entitled to some tithes in kind, but the particular species could not be ascertained, through the negligence of all parties. The Court directed an issue to try whether he was endowed of any, and what tithes.

Potts v. Durant. 797

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1. An action was brought upon bills of exchange given by mistake, and a bill for discovery and relief, to

have them delivered up, filed: upon the trial at law the defendant there had a verdict; he then amended his bill to state that fact and proceeded in Equity. He is entitled to a decree to have the bills delivered up, although, by the judgment at law they cannot be enforced.

Lisle v. Liddle. Page 649

2. Equity will relieve even after the money is in the hands of the sheriff on an execution at law, against a bill of exchange given for unlawful procuration of a commission in the army.

Whittingham v. Burgoyne. 900

Election.

1. Where a vessel seized is returned here forfeited for smuggling, and the seizing officer also prosecutes in the Admiralty, as a prize, as an enemy's property, this Court will not make him elect.

The Attorney General v. Appleby.
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Potts v. Durant. 789

2. A terrier found in the archdeacon's registry is admissible.

Ibid. 795

3. A terrier, although not signed by the impropriate rector, nor by any person for him, is evidence against him as to his right to tithes in the parish.

Ibid. 796

4. Fifteen years possession of a benefice is *prima facie* evidence of a regular induction, and of reading the 39 articles.

Chapman v. Beard. 942

5. Payment of tithes by the defendant, a parishioner, is *prima facie* evidence against him of the rector's title.

Ibid.

6. Immemorial nonpayment of any tithes, from a district, cannot raise a presumption of an exemption by grant from the lay rector; but is strong evidence to explain the extent of the grant of the rectory, if at all doubtful.

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1. This Court having jurisdiction over all matters relating to the revenue, can control the conduct

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Ex parte Durand. Page 743

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1. Two extents issued into different counties for the same debt; both sheriffs seized goods; the debt was paid to the one before a *venditioni exponas* issued to either. He shall have the whole poundage.

The King v. Barber. 717

2. But where the debt was paid to the officers of the crown immediately, although by compulsion of the one levy, the poundage was apportioned between the sheriffs.

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The King v. Bellamy. 898

2. An order of the justices to keep in confinement, for three days,

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The King v. Bellamy. Page 898

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Andrews v. Berry. 634

2. In a bill of discovery to support an action by a common informer for money won at play, it is sufficient to state that the defendants, or some of them for the benefit and on account of all, played and won.

Cowan v. Philips. 843

3. In such a bill it is not necessary to state the nature of the action brought; it is sufficient to shew that an action was brought on the statute 9 Anne, to recover the money, and to shew by the facts that an action on the statute lay.

Ibid.

H.

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I.

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Nichols v. Philips. Page 636

2. The Court will not interfere by injunction (in the nature of an order to stay waste) to prevent a breach of contract, where no trespass is committed.

Longman and others v. Calliford.
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3. Nor to prevent a tenant's selling dung off the farm, contrary to the covenants of the lease.

Johnson v. Goldswaine. 749

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——— *v. Blackwood.* 851

Insurance.

1. In a policy of insurance from loss by fire, from half a year to half a year, the insured agreed to pay the premium half yearly, "as long as the insurers shall agree to

"accept the same," within fifteen days after the expiration of the former half year; and it was stipulated that no insurance should take place till the premium was actually paid; a loss happened within fifteen days after the expiration of one half year, and before the premium for the next was paid; the insured afterwards, and within the fifteen days, tendered the premium, which was refused. It was held that the insurers were not liable.

Tarleton v. Staniforth. Page 707

Interest of Money.

1. A judgment debt carries interest.

Thomas v. Edwards. 804

2. A purchaser of a future interest, after a term, shall not pay interest, on an increased price, for a part of the term elapsing before the purchase is completed, unless the delay be by his fault.

Growsack v. Smith. 877

Interpleader.

1. A tenant cannot file an interpleading bill against his landlord.

Johnson v. Atkinson. 798

2. Where one claimant seeks a certain rent from a tenant in possession, the other unliquidated damages for use and occupation, he cannot make them interplead.

Ibid.

3. Where one rector claims a modus, and the rector of another parish claims tithes in kind of the same

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lands, they cannot be made to interplead.

Woolaston v. Wright. Page 801

Joinder in Suit.

See PRACTICE IN EQUITY 6.
PLEADINGS IN EQUITY 7, 9, 10,
11, 13. MODUS 8, 9.

Judgment.

See INTEREST OF MONEY 1.

L.

Lease.

See COVENANT 1.

1. An agreement for a lease, "with
"all usual and reasonable cove-
"nants," a covenant not to un-
derlease or assign is implied, where
the custom of the place is not ge-
nerally otherwise.

Folkingham v. Croft. 700

Legacy.

See DEVISE.

1. A testator gave a legacy to "every
"of the sons and daughters of his
"late cousin;" his cousin had
left one legitimate daughter, and
one son and one daughter illegiti-
mate; the latter are not entitled

under the will, nor is evidence of
such intention admissible.

Hart v. Durand. Page 684

2. A. devised to each of the children
of B. 50l. to be paid to the father
for their use. The father left to
each of his children 260l. if they
attained the age of twenty-one
years. This is no satisfaction of
the other legacies.

Pullen v. Cressy. 830

S. P. Field v. Mostyn. 831 n.

Length of Time.

See DISCOVERY 1. MORTGAGE 2.
EVIDENCE 4.

Licence.

1. If a cutter obtains a licence from
the Admiralty, as intended to
"proceed on a voyage to Lisbon,
"and sails upon a different voy-
"age, she is liable to forfeiture,
"and may be seized although
"then lying in her original port.
The Attorney General v. Brown.
720

2. If a cutter has a licence, as "in-
"tended to be employed in the
"oyster fishery, from the Isle of
"Wight to Spurn Point," by a
voyage to Hamburg she becomes
liable to forfeiture.
The Attorney General v. Roote. 725

Lien.

1. Where an author agrees with
bookseller to publish his work.

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and to allow him interest for the money he shall advance, and also a share of the profits, the book-seller has a lien on the copy-right, for his disbursements. *Semb.*

Brook v. Wentworth. Page 881

M.

Marriage Settlement.

See COVENANT 2.

Mill.

See TITHES 10, 11.

Misnomer.

1. Where the name of the plaintiff is mistaken in the process, and in all the proceedings, the Court will give leave to amend while all is in paper.

Gardner v. Walker. 935

2. Whether a misnomer of the plaintiff is a cause of nonsuit. *Qu?*

Ibid.

See TITHES 6, 7. EVIDENCE 6.

1. A modus payable by the owners of land covered by it, is good.

Ord v. Clarke. 638

S. P. Scarr v. Trinity College.

765—6

2. A modus claimed in respect of divers pieces of land, consisting of about sixty-one acres, parcel of a certain ancient estate called *R.*, consisting of 1500 acres, was held good.

Ord v. Clarke. Page 638

3. A modus claimed for hay was described in the terriers to be for all grass, "except clover and the like." This is not a proof of the modus being modern.

Franklin v. Spilling. 760

4. A bill to establish a modus, stated that in the parish of *A.* in *Yorkshire* there are certain ancient townships, hamlets, or districts, called *A.*, *B.*, and *C.*, "distinguished by certain well-known boundaries and limits," and claimed the modus in respect of each. This is good, without setting forth the limits or extent of each district, or distinguishing whether each is a township, hamlet, or district.

Scarr v. Trinity College. 764

S. P. Chaytor v. Trinity College.

841

5. The claim of exemption from tithes, or any other satisfaction for the same than the sum of 4s. 1d., is a sufficient averment that that sum is due and payable.

Ibid. 765—6

6. The bill stated the modus to have been immemorially paid by the owners and occupiers, or some of them. This is good.

Ibid.

7. The bill stated the modus to have been immemorially paid by the district by contribution. No contribution had ever in fact been made. Yet it was held good; for the payment being in its nature contributory, each payment was, as between the rector and parishioners, a payment by contribution.

Ibid. 767

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8. In a bill to establish a contributory modus, all the persons liable to the contribution need not to be parties.

Scarr v. Trinity College. Page 768

9. The rector of *M.* claiming tithes in kind, the occupier and landlord filed a cross bill to establish a modus payable to the rector of *S.* by the lord of the liberty of which the lands were parcel. It was objected, 1. That the Rector of *S.* not disputing the modus, a bill would not lie to establish it. 2. That the other owners of lands in the liberty should have been parties. The objections were allowed, and the bill dismissed.

Woolaston v. Wright. 802

10. A modus claimed for lands as being part of an ancient estate without naming the ancient estate, or setting forth the abuttals, or any description of it, or of the lands of the defendant in it, is bad.

Wood v. Wray. 838

11. One owner of lands in a township may sue for himself and the others, to establish a contributory modus for all the lands there.

Chaytor v. Trinity College. 841

Mortgage.

See PRACTICE IN EQUITY 13.

1. On a bill to redeem, the mortgagee cannot object that the bill does not state a valid legal conveyance to him.

Roberts v. Clayton. 715

2. Baron and feme, seized in fee in right of the feme, mortgage by fine, and afterwards convey the equity of redemption, by lease and

release, to the mortgagee; the mortgagee remains in possession as complete owner for more than twenty years, during the life of the husband, tenant by the curtesy; upon the death of the husband, the heir of the wife may redeem, notwithstanding the lapse of time.

Corbett v. Barker. Page 756

3. Where a mortgagee brings an ejectment to get possession, and the mortgagor moves to stay proceedings on payment of what is due and costs; if the mortgagee gives notice of other demands, as cause against the order, he must specify the nature and amount of such demands.

Goodtitle on dem. Leon v. Lonsdown 937

N.

New Trial.

1. In an action for assault and battery, the writ of inquiry was set aside for excessive damages.

Goldsmith v. Lord Sefton. 808

Notice.

See TITLES 3.

Nuisance.

See COMMON 1.

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P.

Parties (to a Suit).

See PLEADINGS IN EQUITY 7, 9, 10, 11, 13. PRACTICE IN EQUITY 6.

Payment of Money into Court.

See COSTS 1. PRACTICE AT LAW 13.

1. In a suit for various articles of tithes, the defendant offered to pay into court the value of all but one of the articles claimed, with the costs of suit as to them. It was held that he must pay the whole costs then incurred.

Worral v. Millor. Page 632

Pleadings in Equity.

See MODUS 2, 4, 5.

1. Bill of foreclosure as to a messuage and forty acres of land; plea deducing a title to the premises, and stating them to be a *messuage and tenement*. The plea is bad, as not relating to the land demanded.

Wedlake v. Hutton. 633

2. On a bill for an account after an award, on the ground of matters stated not to have been comprehended in it, it must appear

clearly that the award is not final; otherwise a plea of the award is good.

Routh v. Peach. Page 637

3. As to the effect of many inconsistent defences.

Nagle v. Edwards, 702

4. On a bill to redeem, the mortgagee cannot object that the bill does not state a valid legal conveyance to him.

Roberts v. Clayton. 715

5. A demurrer to the relief is overruled by an answer to the discovery of the facts on which the relief is prayed.

Ibid.

6. A submission to arbitration was made a rule of court, and an award made; the bill stated the award to have been obtained by misrepresentation of facts not then known to the plaintiff. Plea, the award alone, and no answer. The plea is bad.

Gartside v. Gartside. 735

7. A corporation may join in a suit to establish a claim of exemption in favour of its individual members.

London v. Liverpool. 738

8. A plea stating that the plaintiffs, who claimed as citizens of London, never were resident there, or paying scot and lot, and that they were admitted freemen by fraud, for the purpose of enjoying a certain exemption, is bad for duplicity.

Ibid.

9. In a devise to sell, and the produce to be divided, all the persons interested in the fund must be parties, although the land is sold before the suit.

Faithful v. Hunt. 751

10. In a bill to establish a contributory modus, all the persons liable to the contribution need not be made parties.

Scarr v. Trinity College. 768

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11. In a bill to establish a modus where the rector is an eleemosynary foundation, of which the King is visitor, the Attorney General need not be made a party.

Scarr v. Trinity College. Page 768

12. A bill to perpetuate testimony, going on to pray relief on the same matters, is good.

Ibid.

13. One owner of lands in a township may sue for himself and the others, to establish a contributory modus for all the lands there.

Chaytor v. Trinity College. 841

14. On a general demurrer to a bill seeking relief, an objection to the discovery, as subjecting the defendant to penalties, is not competent.

Whittingham v. Burgoyne. 900

Pleadings (at Law.)

1. A contract for goods was put an end to by both parties, but the goods were in the possession of the intended purchaser; the value rising, he converted them to his own use, and offered the former price. The owner demanded the increased price, and on refusal, held the defendant to bail "for goods sold and delivered." This does not prevent him from suing in trover.

Parry v. Dawson. 710

2. A *sci. fa.* against two "that they severally be and appear to shew cause," &c. on a bond to the crown executed by three, is bad.

The King v. Chapman. 811

Public Policy.

See EQUITY 2.

Policy of Insurance.

See INSURANCE.

Poundage.

See EXTENT 1, 2.

Practice in Equity.

See INJUNCTION. EQUITY.

1. A bill to perpetuate testimony of a modus, being amended by adding an essential party, after the commission executed, but before publication, a new commission was granted.

Biddeford v. Partridge. Page 646

2. Where an order *nisi* for sequestration is obtained against a privileged person, he is not in contempt unless he neglects to obey the order *nisi*.

Smallbrook v. Lord Donegall 647

3. Such an order may be served on the clerk in court of the defendant.

Ibid.

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4. The Court will not direct the officers of the Ecclesiastical Court to deliver out the original will to be produced here, merely to save the expence of a copy.
Wells v. Corbyn. Page 648
5. Where an injunction is obtained for want of an answer, and an answer afterwards filed, but the defendant does not move to dissolve the injunction till two terms afterwards, and when the bill has been amended, yet the injunction may be dissolved upon motion of course.
Patton v. Panton. 651
6. One of two joint executors and residuary legatees assigned his interest, and died; the assignee filed a bill to have half the residue transferred to him. The representative of the assignor need not be a party, unless there appear any doubt of the validity of the assignment.
Blake v. Jones. 651
7. Increase of price offered, is not alone a reason to open biddings after the report confirmed.
Boyer v. Blackwell. 656
8. Where one person is reported purchaser of several lots before the Master, if the biddings are opened as to one of the lots, he shall have an option to open them as to all. *Semb.*
Ibid.
9. In a motion for an injunction, the plaintiff cannot read affidavits to contradict the answer.
Somerville v. Buckler. 658
10. *A.* sued at law on a policy of insurance which he had made as agent for *B.* On a motion for an injunction on affidavit of *B.*'s residing abroad, *A.* must have notice. *Semb.*
Beachcroft v. Gordon. 686
11. As to the effect of many inconsistent defences, see
Nagle v. Edwards. 702
12. In a bill by legatees against the executor, if he admits on his examination a balance due, and claims no interest, the Court will order him to pay it before the report.
Cargenven v. Peters. Page 751
13. A second mortgagee, the plaintiff, applied for a receiver; this was opposed by a defendant who had purchased from the plaintiff part of his mortgage, and was in possession as tenant of a part of the estate of which the rent was equal to the interest of his share of the mortgage. The order was granted.
Archdeacon v. Bowes. 753
14. After an order *nisi* to dismiss for want of prosecution, the plaintiff filed a replication; and afterwards moved to withdraw the replication and amend, on affidavit of materiality; he must also shew why the facts introduced by the amendment could not have been stated before.
Longman v. Calliford. 807
15. No witness ought to be examined after publication, although sworn before.
Jenkinson v. Pepys, Bart. 835
16. The Court will grant an injunction to prevent the negotiating a note obtained at play, upon affidavit, before service of the subpoena.
— *v. Blackwood.* 851
17. A bill for discovery of the contents of a lost deed, and to have a new one executed, must be accompanied by an affidavit of the loss of the former.
Rootham v. Dawson. 859
18. Where the bill is amended after answer, by adding a defendant, the original defendant cannot answer the amended bill, nor have any order for time to answer.
Gill v. Mathews. 879

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19. In a suit to obtain testimony for defence of a suit at law, the Court will not grant a commission to examine witnesses abroad, unless on good grounds shewn, although no injunction is moved for.

Shedden v. Baring. Page 880

20. An interrogatory being suppressed as leading, the Court, on the circumstances of the case, gave leave to exhibit a fresh interrogatory.

Mentill v. Payne. 923

21. Where an injunction is obtained on the absence of one of the defendants abroad, on a motion to discharge that order, the answer of the other defendant cannot be read.

St. John v. Cargill. 933

22. After exceptions are allowed, the defendant has eight days to answer, and may then have an order for three weeks, to commence from the end of the eight days.

Cowan v. Philips. 936

Practice (on the Law and Revenue Sides.)

See: COSTS, BAIL, MORTGAGE 3.
INTEREST OF MONEY 1. VENUE,
MISNOMER 1. AMENDMENT.

1. The rule to bring in the body may be taken out on the day immediately after the sheriff has returned the writ, if the time for putting in bail is then expired.

Gore v. Williams. 553

2. Bail excepted to, and not justifying, are yet competent to surrender the principal.

Ibid.

3. An order *nisi* for costs for not proceeding to trial, was served on the clerk in court; this is regular to bring the parties into contempt; and upon service of the *allocatur*, and demand and refusal of the costs, an attachment goes.

Mer-it v. Meek. 656

4. If a sheriff lets a defendant, arrested on mesne process, go at large without bail below, and on being ruled to return the writ, returns *cepi*, but no bail is then put in above, the sheriff is liable in an action of escape; and it is not enough that he puts in bail when ruled to bring in the body.

Jones v. Eamer. 675

5. A *fi. fa.* tested before the death of the defendant, but in fact taken out after it, is bad.

Walker v. Drawater. 680

6. The Attorney General may at any time amend a revenue information, as of course.

The Attorney General v. Henderson. 714

7. Where the interposition of this Court is desired, to control the conduct of the auditors of public accounts, upon grounds merely equitable, and upon complicated facts, the Court will not proceed upon a summary application by motion or petition.

Ex parte Durand. 743

8. Seven terms having elapsed without the Attorney General's bringing on the trial of an information for a seizure, the Court directed the vessel to be returned without security.

The Attorney General v. Richards. 753

9. The rule on the sheriff, to return the writ, expired two days after the end of term; a rule to bring in the body, taken out next day, but tested on the last day of term, was held regular.

Buckler v. Blyth. 779

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10. In an information upon seizure of a vessel, upon affidavit of injury from delay, a writ of delivery was granted on security, after two terms; the defendant waited three terms more without a trial, and then moved to discharge the recognizance; the Court held that the Crown ought to have six terms in all; and that a reasonable cause of delay (absence of witnesses abroad) should be allowed, after the six terms.

The Attorney General v. Denham.
Page 805

11. In an action of assault, the writ of inquiry was set aside for excessive damages.

Goldsmith v. Lord Seston. 808

12. Where goods are in the hands of a sheriff, and are claimed by a subject as seized under a *fi. fa.* issuing out of K. B., and by the crown, under an extent as having a specific lien on the goods for duties, the Court of Exchequer will not stay the proceedings of the crown, so as to let the question be tried in K. B., which ought, by the prerogative, to be tried here.

The King v. Pickman. 852

13. The Court will not stay proceedings in an action of trespass for seizing goods, on the defendant's restoring them, or the value, with costs, where it will not end the suit, and the value is not admitted.

Knott v. Barker. 896

14. A defendant arrested by *quo minus*, while protected by the privilege of C. P. as a suitor there, may be discharged by either court.

Walker v. Webb. 941

Prerogative.

See PRACTICE (at Law) 12.

Prescription.

See TITHES 6, 7.

Privilege.

See PRACTICE (at Law) 14.

Prohibition.

See ADMIRALTY 1.

Purchaser.

See PRACTICE (in Equity) 7, 8.

Q.

Quarter Sessions.

See GAME 1, 2.

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R.

Recognizance.

See GAME 1, 2.

Rent.

See COVENANT 1.

1. If a stranger receives rent due to the testator in his life-time, and afterwards, by desire of the tenant in possession, pays the demand of ground-rent due at the same time, for the same premises, he may deduct such payment, in an action by the executor for the rent; but not a payment of ground-rent, arising after the death of the testator.

Wilkinson v. Cawood. Page 905

Revenue.

See EXCHEQUER 1.

S.

Satisfaction.

See LEGACY 2.

Set-off.

See RENT 1.

Sheriff.

See EXTENT 1, 2. BAIL. PRACTICE AT LAW.

Ship.

See LICENCE 1, 2.

Statutes referred to.

25 H. VI. c. 9.	Page 677
32 H. VIII. c. 7.	703
2 & 3 E. VI. c. 13.	760
1 J. I. c. 22.	872
21 J. I. c. 4.	<i>ibid.</i>
13 & 14 Car. II. c. 11.	809
29 C. II. c. 3.	680
4 & 5 W. & M. c. 20.	<i>ibid.</i>
9 Ann. c. 11.	872
9 Ann. c. 14.	634, 843
3 Geo. I. c. 15. s. 3.	718 n.
18 Geo. II. c. 34.	634
20 Geo. II. c. 3.	856, 921
25 Geo. II. c. 36.	850
13 Geo. III. c. 80.	898
17 Geo. III. c. 6.	865
17 Geo. III. c. 50.	813
19 Geo. III. c. 56.	<i>ibid.</i>
24 Geo. III. c. 19.	872
24 Geo. III. Sess. 2. c. 47.	720
25 Geo. III. c. 47.	855, 921
25 Geo. III. c. 52.	745
27 Geo. III. c. 1.	862
27 Geo. III. c. 32.	720, 725, 6
34 Geo. III. c. 50.	720, 724
36 Geo. III. c. 104.	862

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T.

Taxes.

See ASSESSMENT 1, 2.

1. The Court will not upon motion enter into any question on the assessed taxes.

The King v. The Commissioners of the Navy. Page 858

Terrier.

See EVIDENCE 2, 3. MODUS 3.

Time,

See DISCOVERY 1. MORTGAGE 2. INTEREST OF MONEY 2.

1. Where by the terms of an auction the sale is to be completed by a certain day, yet if neither party takes any step to quicken the other, the time is waived, and equity will interfere to prevent the purchaser from taking advantage of it at law.

Jones v. Price. 924

Tithes.

See MODUS. EVIDENCE 6.

1. Stubble mowed and used as fodder or manure is not titheable.

Tennant v. Stubbing. 640

2. A custom of tithing, by throwing aside every tenth sheaf as the corn is about to be carried, is bad. Tithes must be so set out that the rector may compare them with the other parts.

Tennant v. Stubbing. Page 640

3. Where, by the custom, notice of tithing is to be given, an hour's notice is not sufficient.

Ibid.

4. Setting out of tithes cannot be dispensed with, even where the uncertainty of the weather prevents the corn from being put in shocks at all.

Franklyn v. Gooch. 682

5. Mere non-payment of a particular species of tithe is no evidence against a lay rector of a conveyance of that tithe.

Nagle v. Edwards. 702

S. P. Lord Petre v. Blencoe. 945

6. A prescription in *non decimando*, can only be set up for a large tract of country, well known as a separate district.

Nugle v. Edwards. 702

7. Whether such a prescription can be set up against payment of tithes due of common right. *Qu?*

Ibid.

8. Agistment is a predial tithe.

Scarr v. Trinity College. 760

9. The bill was for tithe of agistment of barren and unprofitable cattle; the defendant, supposing it not to relate to sheep, made no defence as to them; the Court refused to direct an account as to sheep.

Turner v. Williams. 829

10. A water-mill is titheable as a predial and local tithe in respect of the person to whom it is payable, but as a personal tithe in the mode of accounting.

Hall v. Machett. 915

11. The tithe of the clear profits of a mill being alone due, the rent is the first deduction; and in the case of

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a new mill, in the occupation of the owner, an yearly value, in the nature of a rent, is to be put upon it and deducted.

Hall v. Macdonald. Page 205

12. A farmer may cut down wood in any portions most convenient, provided he sets out all then cut down, before any is carried away, and provided it be not done vexatiously.

Ibid.

13. Clover hay is titheable in the cock, not in the swathe.

Collyer v. Howes. 954

V.

Venue.

1. The venue of an information on 24 Geo. 2. c. 19. for being both a tanner and a shoemaker, need not be in the county where the offence was committed.

The Attorney General v. Ferris.

871

Vendor and Vendee.

See PRACTICE IN EQUITY 7, 8.

ANNUITY 1. INTEREST OF MONEY 2. TIME 1.

U.

Usury.

1. Action on bond; plea, that after the execution of the bond, the plaintiff took from the defendant more than legal interest, was held bad.

Nichols v. Lee. Page 940

W.

Will.

See DEVISE. LEGACY. PRACTICE IN EQUITY 4.

END OF THE THIRD VOLUME.







